United States Court of Appeals
for the Second Circuit

APPENDIX

77-1402

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1402

B
P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

MARION KNUCKLES,
Appellant.

On Appeal from the United States District Court
For the Southern District of New York

APPELLANT'S APPENDIX

UNITED STATES COURT OF APPEALS
FILED
NOV 30 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Jay Goldberg
Attorney for Appellant
Marion Knuckles
299 Broadway
New York, N. Y. 10007
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Southern District of New York
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PAGINATION AS IN ORIGINAL COPY

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CRIMINAL DOCKET - U.S. District Court

Cl. 9-12-77

A 2

0208 1 0365

x

District Office

KNUCKLES, MARION,
a/k/a "Glenn"

(LAST, FIRST, MIDDLE)

☐ JUVENILE

05 05

No. of Defs * 05

77 0340 01

Yr. Docket No. Def.

U.S. TITLE SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
21:846	Consp. to violate Federal Narcotics Laws	1
21:812, 841(a)(1) & 841(b)(1)(B)	Distr, & possess. of Heroin, I.	2

SUPERSEDING COUNTS

U.S. MAG CASE NO.

BAIL • RELEASE

☐ Denied AMT Set $ 000

☐ Fugitive
☐ Pers. Recog
☐ PSA

Date

☐ Bail Not Made
☐ Status Changed (See Docket)

CONDITIONS
☐ 10% Deposit
☐ Surety Bond
☐ Collateral
☐ 3rd Prty Cust
☐ Other

II. KEY DATES & INTERVALS

ARREST or U.S. Custody Began

Summons Served

First Appearance

High Risk Date

Indict. Waived ☐

In Charging District

INDICTMENT ☒ Information ☐ 5-5-77

Superseding ☐ Indict/Info ☐

ARRAIGNMENT 5-12-77

1st Plea 5-12-77

Final Plea

Trial Set For 6-27-77

☒ NG ☐ G ☐ NOL

G. Plea W/Drawn

☐ NG ☐ G ☐ NOL

TRIAL

Voir Dire ☐

Trial Began ☐ J N ☐ J

Trial Ended

Disposition of Charges 7-18-77

☒ Convicted
☐ Acquitted
☐ Dismissed:

SENTENCE 9-12-77

☒ On All Charges
☐ On Lesser Offense(s)

☐ WOP: ☐ WP

☐ On Governm'ts Motion

MAGISTRATE

	DATE	INITIAL/NO.
Search Warrant Issued		
Search Warrant Return		
Summons Issued		
Summons Served		
Arrest Warrant Issued		
COMPLAINT		
OFFENSE (In Complaint)		

INITIAL APPEARANCE DATE

PRELIMINARY EXAMINATION OR ☐ REMOVAL ☐ HEARING — Date Scheduled / Date Held

☐ WAIVED ☐ NOT WAIVED

☐ INTERVENING INDICTMENT

Tape Number

OUTCOME:
☐ DISMISSED
☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.

Alan Levine
791-0932

236

ATTORNEYS

Milton Rosenberg
401 Bway, NYC 10013
925 9770

Show last names and suffix numbers of other defendants on same indictment/information

Doe-02, Brown-03, Smith-04, Simpson-05

EXCLUDABLE DELAY (a) (b) (c) (d)

DATE	DOCUMENT NO. PROCEEDINGS
5-5-77	Filed Indictment & Ordered sealed. Bail fixed in the amount of $100,000.00........Knapp, J.
5-6-77	B/W Ordered........Knapp, J. B/W Issued.
5-6-77	Indictment Ordered unsealed........Knapp, J.
5-5-77	Filed Govt's. designation of high risk deft.
5-12-77	Deft. (atty. Milton Rosenberg present) pleads not guilty. Deft. continued remanded in lieu of bail fixed at $25,000 cash or surety. Case assigned to Haight, J. for all purposes. ....Knapp, J.
5-16-77	Filed the following papers from Mag. Bernikow, (Mag.#77-628) Docket Sheet PRB in the amt. of $25,000. Co-Signed by Lillie J.Bryant - Surety Co. Stuyvestant Ins. Co., 877 Brook Ave, Bx NY. acknowledged by Mag. Bernikow.

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW IN SECTION V. ANY OCCURENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	IV. PROCEEDINGS (continued) PAGE TWO DOCUMENT NO.	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
5-16-77	Filed Notice of Appeeance by Miltin M. Rosenberg,401 Bway, NYC,.				
:6-77	Filed the following papers rec'd from Mag. Raby.(Mag.#77-603) Docket Sheet, Warrant of Arrest - executed on 5-6-77 Disposition Sheet Fincial Affdvt. Order Appointing Fed. Defender as counsel for dft.				
5-17-77	P.T.C. Dft. Marion Knuckles a/k/a "Glen represented by Milton Rosenberg,Govt. by Alan Levine,AUSA, Trial date set for 6/27/77 @ 10 AM All motions by June 6,77.......Haight J.				
5-9-77	Filed the following papers rec'd from Mag. Office (Mag.Raby) (Mag. #77-603......Mag. Final Commitment.				
6-24-77	Filed Govts. Affdv. for W/H/C Ad Testificandum of Betty MCFarland. Writ Iss.Dtd. 6/27/66				
6-28-77	Filed Govts. Affdvt. for W/H/C Ad Testificandum of Betty MCFarland Writ Adjourned to 6-24-77.......Bonsal J.				
7-19-77	Filed transcript of record of proceedings, dated 5-17-77				
7-5-77	Trial begun				
7-6-77	Trial cont'd				
7-7-77	Trial cont'd				
7-8-77	Trial cont'd				
7-11-77	Trial cont'd				
7-12-77	Trial cont'd, all parties rest.				
7-13-77	Trial cont'd, summations, Judge's charge to Jury				
7-15-77	Trial cont'd, Jurors continue deliberations				
7-18-77	Trial continues, Jurors continue deliberations. Jury verdict at 3:p.m. Deft. guilty on Cts. 1 and 2 . Bail revoked, deft. is remanded. Pre-Sentence report ordered, deft. to be sentenced on 8-31-77.......Haight, J.				
7-25-77	Filed Opinion #46206, on Court's ruling with respect to possible variance between the charge in the indictment and the proof adduced at trial. ......Haight, J. m/n				
8-15-77	Filed Sealed Envelope - Pgs. 317-322				
8-25-77	Filed Gov't Sentencing Memorandum				
9-13-77	Filed JUDGEMENT & COMMITMENT: Deft W/Atty Milton Rosenberg, present. The deft is hereby committed to the custody of the Atty Gen., or his authirized representative for imprisonment for a period of EIGHT (8) YEARS on COUNT ONE. On COUNT TWO, a period of FOUR (4) YEARS, to run consecutively to them of imprisonment imposed on COUNT ONE. Pursuant to Title 21, U.S.C. 841(c), deft is placed on SPECIAL PAROLE for TEN (10) YEARS on COUNT ONE, and a similar Parole of TEN (10) YEARS on COUNT TWO, said terms of parole to run concurrently with each other..................HAIGHT.J. ISSUED COPIES.				

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

F

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

A 4

MARION KNUCKLES
A/K/A "Glenn"

77 340
Yr. Docket N

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE (a)	(b)
9-14-77	Filed Deft's Notice pf Appeal from judgement ent. 9-12-77.... (copies mailed & issued.).		
9-19-77	Filed true copy of J/C with marshal's return, deft. delivered to Warden at MCC on 9-12-77		
9-27-77	Filed Transcript of record of proceedings, dated 7-5, 6-7, 8, 11, 12, 13, 15, 18-77		

6

A TRUE COPY
RAYMOND [illegible] BURCHARDT, Clerk
By
Deputy Clerk

A 5

77 CRIM. 0340

AL:kco

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------------------------------------x

UNITED STATES OF AMERICA,

-v-

MARION KNUCKLES, a/k/a "Glenn",
JANE DOE, a/k/a "Gwen", RAYMOND BROWN,
ROSE SMITH, and YOLANDA VALDEZ SIMPSON,
a/k/a "Yogi",

Defendants.
---------------------------------------x

INDICTMENT

77 Cr.

The Grand Jury charges:

1. From on or about the 1st day of August, 1976, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, MARION KNUCKLES, a/k/a "Glenn," JANE DOE, a/k/a "Gwen", RAYMOND BROWN, ROSE SMITH and YOLANDA VALDEZ SIMPSON, a/k/a "Yogi," the defendants, and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about August 16, 1976, MARION KNUCKLES, a/k/a "Glenn", the defendant, had a telephone conversation concerning the conditions in the street for selling heroin.

2. In or about October, 1976, MARION KNUCKLES, a/k/a "Glenn", JANE DOE, a/k/a "Gwen", and RAYMOND BROWN, the defendants, delivered a quantity of quinine and bonita to the defendant YOLANDA VALDEZ SIMPSON in the vicinity of 1160 Fifth Avenue, New York, New York.

3. In or about October, 1976, MARION KNUCKLES, a/k/a "Glenn", and JANE DOE, a/k/a "Gwen", the defendants, delivered a quantity of heroin to YOLANDA VALDEZ SIMPSON, the defendant, in the vicinity of 1160 Fifth Avenue, New York, New York.

4. In or about October, 1976, MARION KNUCKLES, a/k/a "Glenn", RAYMOND BROWN, ROSE SMITH, and YOLANDA VALDEZ SIMPSON, the defendants, diluted heroin with quinine and bonita and placed the diluted heroin in approximately 2000 quarter bags of heroin hydrochloride in the vicinity of 626 Riverside Drive, New York, New York.

5. In or about October, 1976, MARION KNUCKLES, a/k/a "Glenn", the defendant, gave YOLANDA VALDEZ SIMPSON, the defendant, approximately $400.00.

6. On or about October 12, 1976, YOLANDA VALDEZ SIMPSON, the defendant, had a telephone conversation concerning an argument with the defendant MARION KNUCKLES, a/k/a "Glenn" about the payment to her of additional money for preparation of the heroin for distribution described in Overt Act Number 4.

COUNT TWO

The Grand Jury further charges:

On or about the 1st day of October, 1976, in the Southern District of New York, MARION KNUCKLES, CC:kco

A 7

a/k/a "Glenn", JANE DOE, a/k/a "Gwen", RAYMOND BROWN, ROSE SMITH, and YOLANDA VALDEZ SIMPSON, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 2,000 quarter bags of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).).

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

CHARLES S. HAIGHT, JR, J   Alan Levine, AUSA

A 8

United States District Court for

United States of America vs.

DEFENDANT: MARION KNUCKLES, a/k/a "Glenn"

SOUTHERN DISTRICT OF NEW YORK

DOCKET NO. ➤ 77 Cr.0340

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO-245 (6/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date →

MONTH	DAY	YEAR
Sept.	12,	1977

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Milton Rosenberg
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☐ NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~/verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with others to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code. AND, unlawfully, wilfully and knowingly did distribute a Schedule I controlled substance, to wit, approximately 2,000 quarter bags of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHT YEARS (8) on Count ONE. On Count #TWO, a period of FOUR (4) YEARS, to run consecutively to the term of imprisonment imposed on Count ONE.

Pursuant to Title 21, U.S.Code, §841(c), defendant is placed on Special Parole of TEN (10) YEARS on Count #ONE; and a Special Parole term of TEN (10) YEARS on Count #TWO, said terms of parole to run concurrently with eachother, Periods of parole to commence upon expiration of confinement.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

JJ

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

MICROFILM
SEP 13 1977

U. S. DISTRICT COURT
FILED
SEP 13 1977
S. D. OF N. Y.

SIGNED BY
☒ U.S. District Judge
☐ U.S. Magistrate

Charles S Haight
CHARLES S. HAIGHT, JR.

Date September, 12, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA, :
-against- :
MARION KNUCKLES, et al, :
Defendants. :

- - - - - - - - - - - - - - - - - - x

77 Cr. 340-CSH

MEMORANDUM OPINION

HAIGHT, District Judge:

During the trial of this criminal case, a question arose with respect to a possible variance between the charge in the indictment and the proof adduced at trial. The Court ruled that no variance was presented. It was necessary, as a practical matter to make that ruling orally, prior to counsel's summations and the Court's instructions on the law to the jury. The purpose of this memorandum is to set forth the Court's reasoning in greater detail.

The defendants were charged, in a two-count indictment, with conspiring to distribute or possess with intent to distribute controlled narcotic substances, and with the substantive act, both in violation of the Federal Drug Abuse Prevention and Control Act, 21 U.S.C. §§841 et. seq. The indictment referred throughout to the distribution or possession with intent to distribute of a considerable quantity of heroin. The Government's proof on the trial tended to show that the defendants dealt in a substantial quantity of that substance. However, the defendants, on cross-examination of Government witnesses, developed evidence which, if viewed in a certain light, tended to indicate that the substance was cocaine, and not heroin.

The defendants contended that, if the jury found that the requisite elements had been established in respect of the crimes alleged in the indictment, but further found that the substance in question was cocaine and not heroin, there would be a fatal variance between the charge and the proof. It is perhaps fair to say that this contention was put forward with greater vigor in respect of the substantive count in the indictment; but the argument was also made in respect of the conspiracy count.

The Government contended that it had not only charged but proved that the substance in question was heroin. However, addressing the question of possible variance, the Government took the position that a finding by the jury that the substance in question was cocaine, and not heroin, was without legal significance, within the context of both counts of the indictment.

The Court rejected the defendants' contention and accepted that of the Government. That ruling was made known to counsel prior to their closing summations, and those summations were tailored accordingly. The Court charged the jury, in essence, that, with respect to each count in the indictment, if all elements were found to be present, in respect of a particular defendant, the further finding that the substance in question was cocaine, rather than heroin, would make no difference, and the jury was bound to convict.

Each defendant preserved proper exceptions to the Court's ruling and charge on the point.

We start with the proposition that, under Rule 52(a), F.R.Cr.P.:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

The leading case on the materiality of a variance is Berger v. United States, 295 U.S. 78 (1935), in which the Supreme Court stated generally:

> "In Washington & Georgetown R. Co. v. Hickey, 166 U.S. 521, 531, this court said that 'no variance ought ever to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial.' This was said in a civil case, it is true, but it applies equally to a criminal case if there be added the further requisite that the variance be not such as to deprive the accused of his right to be protected against another prosecution for the same offense." 295 U.S. at 83.

In the case at bar, the jury convicted defendants Knuckles and Brown on both counts of the indictment. Defendant Rose Smith was convicted on the first count, but acquitted on the second count.

The following discussion assumes, for the sake of testing defendants' contention, that the jury concluded that the substance in question was cocaine, and not heroin. Whether or not such a finding would bring about a fatal variance, in the light of the above principles must now be analyzed. I first consider the conspiracy count.

That count alleged, in part:

> "2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code."

It is well settled that the references in the indictment to the Schedules contained in the statute are of no significance in determining whether or not there has been a variance between the charge and the proof. Heroin is a Schedule I drug; cocaine is a Schedule II drug. While the indictment, as noted, refers to both Schedule I and II drugs, no variance arises from the fact that (as assumed for the sake of this discussion) the proof demonstrated that the substance in question was cocaine. The proper effect and construction of such an indictment was discussed in United States v. Vento, 533 F.2d 838 (3rd Cir. 1976), in which the defendants alleged that a variance arose out of the fact that, between the time of indictment and the time of trial, the substance which they stood accused of dealing with had been shifted by the Attorney General from Schedule III, where it had been placed originally by Congress, to Schedule II. Rejecting that argument, the Third Circuit stated:

> "It is unnecessary to reach the issue posed by the defendants because the references in the indictment to the section 812 schedule are mere surplusage. Each count in the indictment—whether for conspiracy, use of an interstate communications facility, or possession—was framed in terms of a violation that rested

> upon section 841(a)(1), which prohibits dealing in 'a controlled substance.' Section 841(a)(1) is in no way confined in its scope to any particular schedule of controlled substances, so the crime charged in the indictment does not require more particular specification of the schedule." 533 F.2d at 870-871.

In United States v. Ramirez, 482 F.2d 807 (2d Cir. 1973), the Second Circuit held that no variance arose where the indictment charged violations (conspiracy and a substantive violation) relating to Schedules I and II, whereas the proof related solely to cocaine, a Schedule II substance.

Consequently, there is no significance in the fact that the present indictment contains references to both Schedules I and II.

It must be recognized, however, that the present case differs from Vento and Ramirez, in that in both those cases the Government established the existence of the actual substance alleged in the indictment, whereas in the case at bar (again operating under the assumption which governs this discussion) the Government charged heroin but the proof established cocaine.

However, that precise question was addressed by the Fourth Circuit in United States v. Quicksey, 525 F.2d 337 (4th Cir. 1975), cert. den., 423 U.S. 1087. In Quicksey, the defendants stood accused of violating the Travel Act, 18 U.S.C. §1952, which forbids interstate travel with intent to "promote, manage, establish, carry on, or facilitate" any business enterprise involving narcotics. Defendant Quicksey was charged, in count IX of the indictment, with violating that statute by having an accomplice travel between New York and West Virginia to promote a narcotics business involving heroin. The accomplice, who was the principal witness to the transaction, testified that the drug she transported for Quicksey was cocaine, not heroin. No other witness identified the drug. On this state of the record, Quicksey contended that there was a fatal variance between the drug charged (heroin) and the drug proved (cocaine).

The Fourth Circuit rejected the argument of variance. After referring to the general principles set forth in Rule 52(a) and the Berger case, the court went on to observe, in language strikingly appropriate to the case at bar:

> "Similarly, we find no prejudice in the variance between the allegation of heroin and proof of cocaine in Count IX. Both drugs are narcotics. The gist of the charge in Count IX is engaging in interstate travel to promote a narcotics business. The type of narcotics is immaterial, unless Quicksey was misled and taken by surprise or unless he could not be protected against subsequent prosecution.
>
> "Count IX fully informed Quicksey of the specific offense with which he was charged by allegations that named his accomplice and described the interstate travel as taking place between West Virginia and New York. The evidence disclosed that this was the only trip of this nature made by the accomplice, that heroin and cocaine in the form in which they were transported are similar in appearance, and that Quicksey did not even mention the name of the drug when he commissioned its transportation for his narcotics business. Thus, it is apparent that Quicksey was fully informed of the material details of the interstate travel for which he was charged, and that the trip was so unique that he could not be prosecuted

> again for the same offense. We conclude, therefore, that no prejudice has been shown and that no error was committed in denying his motion for a judgment of acquittal on Count IX because of the variance. Cf. United States v. Ramirez, 482 F.2d 807, 817 (2d Cir. 1973); United States v. Schrenzel, 462 F.2d 765, 769 (8th Cir. 1972)." 525 F.2d at 341-342.

In the case at bar, the overt acts set forth in the conspiracy count set forth with particularity the details of the conspiracy and its workings. As the proof at trial demonstrated, the defendants used the apartment of one Yolanda Valdez Simpson, originally named a defendant but who pleaded guilty and testified for the Government, as the place where the narcotic substance was blended with other substances and placed into quarter-ounce packages. That use of the Simpson apartment was an isolated incident, insofar as the defendants were concerned; while there was some evidence that a prior use had been made of the Simpson apartment, there is no manner in which the defendants could have been misled concerning the nature of the charges being made against them. Also, the indictment is so specific in its details of timing and place that the defendants could not be prosecuted again for the same offense. I agree with the Court of Appeals in Quicksey that the gist of count 1 of the indictment was engaging in a conspiracy to promote the distribution of narcotics, with the type of narcotics being, in the circumstances of the case, quite immaterial.

Furthermore, I hold that the rationale of Quicksey extends to the substantive count as well, although to be sure heroin was specified as the substance in question in that count. Count 2 of the present indictment read:

> "On or about the 1st day of October, 1976, in the Southern District of New York, MARION KNUCKLES, a/k/a 'Glenn', JANE DOE, a/k/a 'Gwen', RAYMOND BROWN, ROSE SMITH, and YOLANDA VALDEZ SIMPSON, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 2,000 quarter bags of heroin hydrochloride."

Again, I am of the view that the gist of the violation is the distribution or possession with intent to distribute of a controlled substance. Under Vento and Ramirez, supra, the fact that the indictment refers to a "Schedule I controlled substance", whereas cocaine is a Schedule II substance, is of no legal significance. And I perceive no reason why the Quicksey rationale should not apply to both conspiracy and substantive counts; indeed, it is fair to say that the count under discussion in Quicksey was in fact substantive, and not conspiratorial. I find further support for this conclusion in United States v. Works, 526 F.2d 940 (5th Cir. 1976), in which the defendants were charged with conspiracy and substantive counts in respect of the distribution of LSD. Following their conviction, the defendants argued on appeal that admission of testimony about their dealings in mescaline was erroneous, since they were indicted for illicit LSD activities, not for illegal dealings in mescaline. Rejecting that contention, the Fifth Circuit observed:

> "Accordingly, appellants' position on this point essentially is a variance argument: that there was a fatal variance between the crime for which they were indicted (involving LSD) and that for which they were tried (involving mescaline). We note, however, that other circuits have rejected appellants' theory, e.g., Quicksey v. United States, 525 F.2d 337 (4th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3333-34 (Oct. 23, 1975) (indicted for transporting heroin, proof established that cocaine was the narcotic), even where the variance entails other-schedule narcotics, e.g., United States v. Ramirez, 482 F.2d 807, 816-17 (2d Cir.), cert. denied, 414 U.S. 1070, 94 S.Ct. 581, 38 L.Ed.2d 475 (1973) (indictment for Schedules I & II drugs, proof relates only to Schedule II narcotics). Both LSD and mescaline are Schedule I narcotics, Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §812(c)(c)(9), (11) (hallucinogenic substances)." 526 F.2d at 947 n. 24.

In the light of these authorities, the Court ruled on the trial and instructed the jury as indicated in this opinion.

Dated: New York, New York
July 21, 1977

CHARLES S. HAIGHT, JR.
U. S. D. J.

One evening last Fall in an apartment on Riverside Drive and 139th Street right here in Manhattan, four people worked till the early morning hours cutting and mixing heroin. They worked on a big glass table with strainers and spoons and turned a package of heroin about this big into 2000 glassine envelopes for sale to the junkies on the street. This man, the defendant Marion Knuckles was in charge. It was his operation. That man, the defendant Raymond Brown, was his righthandman, and that woman Rose Smith, worked all night with these two men and with anotherpreparing that heroin for sale. This case will tell you the story of how these three defendants and others working with them turned heroin into thousands of packages for distribution to people on the street.

My name is Alan Levine and I am an Assistant United States Attorney, and it is my privilege and responsibility to present this case to you on behalf of the government. My purpose in talking to you now, is to give you an idea about what this case is all about. So that when you see the evidence and hear the testimony, you will know where it is all leading. As the Judge has told you, this is a criminal case, and the defendants are charged here with violating the Federal narcotics laws.

The defendants are Marion Knuckles, who will also be referred to as "Glenn," which is a nickname; Raymond Brown in the tan shirt, and RoseSmith in the red shirt. As the Judge has told you, the indictment here is in two counts. It charges very simply two separate violations of the law. Count 1 is the conspiracy count, and it charges that these three defendants and others working with them with conspiring together to violate the Federal narcotics laws. That is, they conspired to possess with intent to distribute heroin. That is Count 1. Count 2 is known as the substantive count, and it charges these three defendants and others with possessing with intent to distribute approximately 2000 glassine envelopes of heroin. That is what the government's proof will show you beyond a reasonable doubt.

Now I want to take a moment briefly to tell you what it is the government will show you. The proof will show that these three defendants conspired together and with others to distribute and possess with intent to distribute heroin in street size glassine envelopes. Those glassine envelopes, ladies and gentlemen, are called quarters or quarter bags. The proof will show you how a large quantity of heroin and mixers are sifted and strained together during all-night session and made into thousands of those quarter bags for sale on the street.

This case then, ladies and gentlemen, is a capsule view. This case is about the defendant Marion Knuckles' operation. You will hear that in late September, 1976, he approached a co-conspirator, Yolanda Valdez Simpson, and asked if sheknew of an apartment in which they could work all night. Yolanda Valdez Simpson made arrangements for him to use her apartment at 66 Riverside Drive right here in Manhattan.

A couple of nights later, Yolanda Valdez Simpson met Knuckles, Raymond Brown and a Gwen Owen, another co-conspirator, at the side entrance of Gwen Owen's apartment on Fifth Avenue and 97th Street. There they loaded Yolanda's car with boxes of mixtures,quinine and bonita and with narcotics paraphernalia. Yolanda and Raymond Brown took those boxes to Yolanda's apartment just as Knuckles told her to.

A couple of nights later, Yolanda and Knuckles met again and Knuckles again took Yolanda with him to Gwen Owen's apartment. There, after meeting with Gwen, Knuckles handed Yolanda a pink shopping bag. That bag contained the heroin.

Once again, just as Knuckles told her to, Yolanda took the bag to her apartment.

So, ladies and gentlemen, the proof will show the travelling heroin factory was all in place.

That night, Knuckles went to Yolanda's apartment, later joined by Raymond Brown and Rose Smith. All night the evidence will show they worked at the dining room table with the heroin. Knuckles, Raymond Brown, Rose Smith and Yolanda. Straining, mixing, spooning, taping, counting out approximately 2000 glassine envelopes of heroin.

Early the next morning, you will hear Knuckles, Raymond Brown and Rose Smith left with the quarter bags for sale to the addicts on the street. The proof will then show you that after Yolanda complained to Knuckles that he didn't pay her enough for what she had done, he beat her up on the street. That basically is the government's proof on the charge in the indictment of distributing and possessing with intent to distribute heroin.

Ladies and gentlemen, you will hear that this conspiracy was not created overnight. The evidence will show that these defendants have known each other at least for a couple of years, that they all hung up around 116th Street and Eighth Avenue in Manhattan, primarily in two different bars, the Roma Gardens and the Satin Doll.

So that is what the government will prove to you here.

Q Do you recall when that was?

A Well, when I seen him after he came back --

MR. WASHOR: I can't hear, your Honor, I'm straining.

THE COURT: Keep your voice up, please.

THE WITNESS: When I seen him when he came back it was in August.

Q Of what year?

A '76.

Q Do you know where he went?

A I heard he went down south.

MR. WASHOR: Objection.

THE COURT: Yes, sustained.

Q Did he tell you where he went?

A No.

Q So, you met him again in August of 1976, is that correct?

A Yes.

MR. LEVINE: Your Honor, I think we have now reached that point in time where the government's proof on this indictment will commence. And the jury should be so instructed that the limiting instruction before does not apply to this evidence.

THE COURT: Well, I think also Mr. Levine, that's

MR. LEVINE: At least at this point, your Honor, the testimony of this witness being received in evidence against all the defendants subject to the connection that you have described.

THE COURT: Very well. Yes , it is. Yes, it is.

Q Turning to the conversation in late August, 1976 between you and the defendant Knuckles who you have identified as "Glenn," what did you say to him and what did he say to you in substance, as best as you recall?

A I told him I needed some work and if there was anything I could do for him and he said, "Maybe."

Q Did you talk to him later about that?

A Yes, a couple of days later, he asked me could I get him an apartment to use.

Q What did you tell him?

A I said I would try.

Q Then did you get back to him?

A Yes, and I told him --

Q Where did that conversation take place?

A In the Roma Garden.

Q Who was present?

A Me and Glenn.

Q What did you say to him and what did he say to you?

A I told him I found a friend of mine's apartment.

A 24

She said she wasn't using it.

MR. WASHOR: Objection. Asked to be stricken.

Unless that friend is alleged to be a member of the conspiracy.

THE COURT: Will such an allegation be made?

MR. LEVINE: No, your Honor, it is not offered for the truth, that portion; it is meant to explain the testimony, her statement to Glenn. The government is not offering the statement of the friend.

MR. ROSENBERG: I would object. I think the testimony should be as a result of a conversation she did something. Certainly that other person is not available for cross examination.

THE COURT: I will strike the reference to what was said. But the witness may testify as to what was done after such conversation.

Q What did you say to Glenn and what did he say to you?

A I can get him the apartment and he asked me where was it, and when I told him, I gave him the address, and he said he would meet me there.

Q Where was the apartment?

A On Amsterdam Avenue.

Q Before he told you to meet him there, did he ask you to do anything?

A No.

Q Before you went up to that apartment, did you go purchase anything?

MR. WASHOR: Objection as leading.

MR. ROSENBEFG: Objected to.

THE COURT: Rephrase it, Mr. Levine.

Q Before you went up to the Amsterdam apartment to meet Glenn, did you do anything?

A He told me and Raymond that he needed some sifters.

Q Who is Raymond?

A Over there.

Q Would you please describe what he is wearing.

A The blue shirt.

MR. LEVINE: May the record reflect that the witness has identified the defendant Raymond Brown?

THE COURT: It may so reflect.

Q So then did you have a conversation with Raymond?

A No.

Q Did you do something with Raymond?

A We bought the sifters.

Q Could you please describe the sifters that you purchased?

A Two small ones with blue handles.

Q Showing you what has been marked Government's Exhibits 1 and 1A for identification, can you identify them?

A Yes, that looks like them.

Q After you purchased these sifters, where did you go?

A He told me to wait at the apartment and he will be dhere shortly .

MR. WASHOR: Can we get a date or time, please?

THE COURT: Let us focus more on the date, if we can.

MR. LEVINE: I think the witness has testified it is late August, your Honor, 1976.

THE COURT: Let's find out.

Can you fix a month or a date in the month for what you have just been telling us, Ms. Simpson?

THE WITNESS: The late part of August, in the evening.

THE COURT: Mr. Reporter, let me hear the last question and answer, please.

(Record read.)

THE COURT: Who is "he," Ms. Simpson?

THE WITNESS: Glenn.

Q Did you meet him at the apartment that night?

A Yes, he came up a couple of hours later.

Q Who was present at that time?

A Glenn, Rose and Raymond.

Q Do you see Rose here in the courtroom?

A Yes.

Q Would you please point her out?

A Red shirt.

MR. LEVINE: Let the record reflect that the witness has identified the defendant Rose Smith.

THE COURT: It may so indicate.

Q What happened that evening in the apartment in Amsterdam Avenue?

A Well, when we got there, they have sifters, spoons, cut and bags.

Q What happened?

A We sifted. He told us --

MR. WASHOR: I object to what "we" did.

Q Who sifted?

A Me, Glenn, Rose and -- me, Glenn, Rose and Raymond.

Q What happened?

A We sifted for a while until he started -- Glenn started spooning it off, bagging it, and we would fold it and tape it.

Q How many kinds of white powder were there on the table?

A About three.

MR. ROSENBERG: That is objected to, your honor. I think it calls for a description. White is white to me. How many kinds of white powder? What are the characteristics that made one different than the other.

THE COURT: I will permit that answer, it can be explored on cross.

Q How long did you work that evening?

A About six hours.

Q How many bags did you prepare?

A 1,500.

Q By you, I mean who else besides you prepared those bags?

A Raymond, Rose and Malcolm -- I mean Glenn and me.

Q What are those glassine bags called, if you know?

A Quarter bags.

Q Did Glenn pay you at the end of that evening?

A Yes.

Q How much money?

A $500.

Q After that evening, did you speak with him again?

A Yes.

Q What did you say to him and what did he say to you?

A He said he might have something else for me to do. But he needed another apartment. He didn't want to use the same one.

Q How long after this late August evening that you have just described did that conversation take place?

A About three weeks.

Q What did you say to Glenn after he asked you about a new apartment?

A I told him maybe he could use mine and he said he would think about it.

Q Did you speak with Glenn again about your apartment?

A Yes, after that, he asked me where was my husband. I told him he was out of town and he said "Okay, what was the address?"

Q What did you tell him?

A I told him where I lived.

Q What was the address?

A 626 Riverside Drive.

Q What street is that in Manhattan?

A 139th.

Q Following that conversation with Glenn, did he tal to you again about your apartment?

A Yes, he told me he wanted me to meet him on 95th Street and 5th Avenue to wait there for him.

Q Did you go to 95th Street and 5th Avenue?

A Yes.

Q Approximately what time of day?

A About 6 in the evening.

MR. WASHOR: Can we get a month,please?

THE COURT: Yes. Let's see if we can fix a date on that.

A September.

MR. LEVINE: I think, your Honor, the witness testified --

MR. WASHOR: Objection to his individual recollection.

THE COURT: I just want to get the witness' own recollection.

Ms. Simpson, you have testified that you went to meet Glenn at 95th Street and 5th Avenue, is that right?

THE WITNESS: Yes.

THE COURT: And it was at about 6 p.m.

THE WITNESS: Right.

THE COURT: Can you tell me the date as best you can recollect?

A The late part of September.

Q Please speak into the microphone.

How did you get to the area of 95th Street and 5th Avenue?

A I drove.

Q When you arrived there at approximately 6 p.m., what did you observe?

A I waited there for about a half an hour and the police stopped and asked me what I was doing.

Q You can't testify as to what the police asked you.

What happened after you talked with the police?

A I told them I was waiting for a friend and then he showed up and told me to drive around the corner and pull up --

Q Who is the friend?

A Glenn.

Q Did there come a time when he showed up?

A Yes.

Q When he arrived, what did you say to him and what did he say to you?

A He told me to drive around the corner and meet him on the side of the building.

Q Did you do that?

A Yes.

Q When you did that, what did you observe?

A I observed Gwen, Raymond and Glenn, coming out with boxes and bags and told me to open the back door of the car.

Q Who told you to open the back door of the car?

A Glenn.

Q After you opened the back door --

THE COURT: Excuse me, Mr. Levine. Let me make sure.

Who did you see? Tell me again who you saw.

THE WITNESS: Raymond and Gwen.

THE COURT: And Gwen?

THE WITNESS: Yes.

THE COURT: And also Glenn?

THE WITNESS: Yes.

THE COURT: All right, go ahead.

Q When had you first met Gwen?

A She knew me, I think --

MR. WASHOR: Objection as not being responsive.

Q When did you first meet Gwen?

A A couple of months before.

Q Who introduced you to Gwen?

A Glenn.

Q That evening when you met outside the building with Gwen, Glenn and Raymond, what happened?

A They put the stuff into the back seat of the car and Glenn toldme and Raymond to take it up to my apartment and meet him at the Roma Garden.

Q So what did you do?

A That's what I did.

Q Who went with you?

A Raymond.

Q Where did you go?

A 626 Riverside Drive.

Q What apartment?

A 13-O.

Q Once you arrived at your apartment, what did you and Raymond do?

A I put all the stuff in the room and we left.

Q What actually did you put in the room that you coul see?

A Boxes and some big bags.

Q Could you see inside the bags or boxes at that time?

A No.

Q Did you return to the Roma Gardens?

A Yes.

Q Once you got to the Roma Gardens, what happened?

A He told me to wait.

Q Who is "he"?

A Glenn.

I waited until about 2 in the morning and then I got tired, I went home and he called me about a half an hour later and told me what happened.

I told him I had got tired and told somebody to tell him that I was going home. So he said he will see me the next day.

Q Did you see him the following day?

A Yes.

Q Where?

A Roma Gardens.

Q Who was present?

A Just me and Glenn.

MR. WASHOR: Your Honor, I have a standing objection to all of this testimony.

THE COURT: I understand.

MR. LEVINE: Your Honor, perhaps we could go to the side bar. I think the standing objection is really no longer appropriate.

MR. WASHOR: I am making it whether he likes it or not, Judge. I want this record protected. I am not going to object after each question. She is having conversations with the defendant Glenn in the absence of the defendant Smith.

THE COURT: I don't think we need a side bar and I think that the objection is appropriate enough and it can stand on its feet.

I think we can go ahead.

Q In the Roma Gardens that day, what did Glenn say to you and what did you say to him?

A He said that he wanted me to meet him at the same place, 95th Street and 5th Avenue.

Q At what time?

A About 7 o'clock.

Q Did you do that?

A Yes.

Q How did you get there?

A I drove.

Q Once you arrived, was Glenn there?

A Yes.

Q What did you and Glenn then do?

A We went upstairs to the building on 95th Street.

Q What floor?

A One flight up.

Q Who answered the door?

A Gwen.

Q What happened when you got in the apartment?

A We sat down, she offered us some wine. We stood there for about 45 minutes. He and her went in the back and he came out --

Q Who is "he"?

A Glenn came out with a shopping bag and passed it to me.

Q What color was that shopping bag?

A Pink and white.

Q Showing you what has been marked Government's Exhibit 2 for identification, can you identify it?

A Yes, that is the bag.

Q That is the bag or that looks like the bag?

A It looks like the shopping bag.

Q After Glenn handed you the pink shopping bag, where did you and Glenn go?

A He told me to drive to my apartment, go straight there, and he will be there shortly.

Q Did you do that?

A Yes.

Q What time did Glenn arrive?

A About 9 o'clock.

Q Was anyone else present?

A No.

Q What took place initially?

MR.WASHOR: Again, could we get a time reference? I mean month or date.

THE COURT: When you say 9 o'clock, you mean 9 p.m.?

THE WITNESS: At night.

Q Can you tell us as best you can recollect today the month, the date of the month?

A October.

THE COURT: All right.

Q What period in the month of October?

A The beginning.

Q What happened initially that evening in the apartment with you and Glenn?

A I straightened up the apartment and I gave them something to eat and then he asked me where was the stuff? I told him, "In the room."

Q What happened after that?

A I helped them bring it out to the dining room.

Q Where was all the material placed?

A In the bedroom.

Q Where was it placed once you brought it out from the bedroom?

A Around the table.

Q What kind of table?

A Round glass table.

Q What happened after all these materials were brought around the glass table?

A We waited a while, and then he said the other two people didn't show up, so we can start working.

Q What did you do, and what did Glenn do as best as you recall?

A He took the stuff out of the shopping bag.

Q What shopping bag?

A The pink and white one. It was wrapped with some paper around it. When he took it out, it was white stuff in it.

Q In the wrapper.

How big was the item that he took out?

A As long as the bag and about 6 inches wide.

Q What else did he take out and put on the table besides the package from the pink shopping bag?

A He told me to take out cubes of bonita.

MR. ROSENBERG: Objection, your Honor. Classification of what it was.

MR. LEVINE: Your Honor, I think the witness can testify to what the defendant told her.

THE COURT: Yes. She can testify as to what she was told by the defendant.

Q What else did you do?

A Then in the bag he took out another large quantity of white stuff.

Q How was that wrapped?

A It was in one of them Baggies.

Q What else was taken out?

A Bags, sifters, spoons, tape, rubber bands.

Q What happened when all those things were on the table? What did Glenn say to you initially and what did you say to him?

A He said we should start now. So I started sifting the cubes against the strainer and --

Q And while you were sifting the cubes against the strainer, what was Glenn doing, if anything?

A Counting out spoons of white powder.

Q Where had the white powder come from that he was spooning?

A Shopping bag.

Q What shopping bag?

A Pink and white shopping bag.

Q Would you please describe to the jury what you mean by "spooning out"?

A Counting it. Leveling it off and seeing how many spoons was in it.

THE COURT: Mr. Levine, while we have that explanation, perhaps the witness could also explain the meaning of the phrase which she used to describe her activity, namely "sifting cubes against the strainer." I don't quite understand that.

Q Could you please describe for the Court and the jury what cubes are?

A Cubes and you have to sift them, rub up against the strainer so they become fine.

Q What was that material?

MR. ROSENBERG: Objected to unless she knows, your Honor.

MR. LEVINE: Or if she was told, your Honor.

MR. ROSENBERG: What she was told is not adequate, Judge. Now we are talking about her own knowledge, not what somebody else told her.

THE COURT: I will permit her to testify as to what the defendant identified this material as if in fact he did so.

MR. ROSENBERG: I agree with your Honor, but not as to what she knows.

MR. LEVINE: I think the question was specifically directed to what she was told, your Honor.

MR. ROSENBERG: No it was not, your Honor. And I would ask that it be read back. He asked her what it was. That was my objection.

I think your Honor realized that.

THE COURT: Put the question as to whether or not she was told what the cubes consisted of.

Q Were you told what the cubes consisted of?

A Yes, bonita.

Q What were you told to do with these cubes of bonita?

A To sift it as fine as I could.

Q How long did that take?

A A couple of hours.

Q How many cubes of bonita did you sift?

A A whole crate. It came in a box.

Q During that time, you testified that Glenn was spooning the other white powder, is that correct?

A Yes.

Q Would you please explain to the Court and jury in as much detail as you can, what you mean by "spooning" that white powder?

A He wanted to know how many spoons was in there.

Q Please confine yourself to what you saw was happening.

A Spooning out what was in the pink shopping bag as

I was sifting.

Q Could you please identify for the Court and jury what the spoon looked like that Glenn was using?

A Like a pink teaspoon.

Q Showing you what has been marked Government's Exhibit 3 for identification, can you identify it?

A Yes, that looks like it.

Q How long did Glenn spoon the white powder?

A About an hour.

Q When Glenn was finished spooning the white powder, what did he do?

A He helped me sift the cubes of bonita.

Q When you and Glenn were finished sifting the cubes of bonita, what happened next?

A What was in the Baggies, he dumped it out on the table, white powder, and he took that and he mixed it with the bonsita and we sifted that as many times as we could.

Q How did you sift that?

A With a strainer.

Q Who else besides you did that?

A Me and Glenn.

Q What strainer did you use for that?

A Two big ones.

Q Showing you what has been marked Government's

Exhibits 4 and 4A for identification, can you identify them?

A That looks like them.

Q At the time that you saw them, were they in that condition?

A No.

Q What is different about them?

MR. ROSENBERG: Your Honor, may I respectfully ask that Mr. Levine classify which is 4 and which is 4A? The record is not clear as to what is in them.

MR. LEVINE: 4 and 4A, your Honor, are two --

MR. ROSENBERG: Which is 4 and which is 4A?

MR. LEVINE: They are marked.

MR. ROSENBERG: I can't see them, Mr. Levine. I want to make a note of what they are.

MR. LEVINE: I have no objection. Show them to counsel.

MR. ROSENBERG: Thank you.

Q What was the condition of them at the time you saw them?

A They were opened.

Q How long did you and Glenn mix together the white powder and the sifted bonita that you had mentioned?

A An hour or so.

Q How was that performed?

A We took the two white powders together and we mixed them.

Q Who, if you recall, got the white powder from the table into the sifters?

A We used playing cards to dump it.

MR. ROSENBERG: Objected to as not responsive. He said "who" did it.

THE COURT: I think that is right.

A Me and Glenn took --

Q What did you do?

A We took playing cards and dumped the white powder into the sifters and then sifted with a spoon.

Q How many times did you do that?

A Maybe ten times.

Q Who did that?

A Me and Glenn.

Q How long did that take?

A A couple of hours.

Q When that was completed, what happened?

A Rose and Raymond rang the bell.

Q Did they come in?

A Yes.

Q When Rose and Raymond arrived, was there any conversation between the four of you?

A Glenn asked them what took them so long and they said --

MR. WASHOR: Objection as to what they said.

May we have the period of time identified?

Q If you recall, who said what?

A Rose and Raymond said they were held up by something.

Q After they had arrived and that short conversation, what happened?

A They brought some snacks with them and I went out and bought some other stuff to eat.

THE COURT: Ms. Simpson, when you said that Rose and Raymond said they were held up by something, did they both speak at this time?

THE WITNESS: Yes.

THE COURT: All right, go ahead.

MR. ROSENBERG: May we have that answer, your Hono
I couldn't hear it.

THE WITNESS: Yes.

Q Where did you get the money to buy the food?

A Glenn gave me $20 to go to the store.

Q How long were you away?

A About 20, a half an hour.

Q 20 minutes?

A A half an hour, right.

Q When you returned, what did you observe?

A They were finishing off what we started.

MR. GRISORIO: Objection, your Honor.

MR. WASHOR: Objection, your Honor.

Q Who was finishing off?

A Glenn, Rose and Raymond.

MR. WASHOR: Withdrawn.

Q What were they doing?

Go on.

A They were sifting.

Q What were they doing?

A They were sifting the white powder.

Q Was that the job that you had started with Glenn?

A Yes.

Q When did that complete? When was that completed, excuse me.

A Well, after he took what was in the shopping bag and mixed it with the two white powders.

Q When did that happen?

A When I got there, he started putting --

Q Who is "he"?

A Glenn started putting the white powder that was in the shopping bag into the quinine and bonita and mixing it it with cards and then he told us to sift it as many times as we could.

Q Who sifted it?

A All of us.

Q Would you please explain to the jury and the Court in as much detail as you can, what you mean by "sifting it"?

A He put as much as you can into the sifter and you run it through so it can be fined or mixed together.

Q How many times did you do that?

A Ten times.

Q After that was completed, what happened next? As best as you recall.

A Rose opened the bag, Glenn counted off --

Q What did Rose do specifically?

A She took the bag, opened it up so it would be easy for him to just dump it in.

Q What bag?

A Glassine bag.

Q Would you please describe to the jury what she in fact did?

A She opened it up with her fingers and laid it on the table, he would pick it up.

Q Who is "he"?

A Glenn would pick it up with a certain amount of spoons inside of it and pass it. We would fold it up.

Q Who would he pass it to?

A Me and Raymond would fold it up and put tape around it.

Q How many bags like that did Rose open up?

A About 2,000; 2,500.

Q How would she do it? Where did she place them after she opened them up?

A On the table next to Glenn.

Q Where were each of you standing at this time?

A Rose was sitting one spot, Glenn was next to her, I was next to Glenn and Raymond was next to me.

Q Would you please describe to the jury how the process went.

A After she opened it and put the spoons in the bag and passed it to me, I would fold it, tape it and Raymond would do the same thing.

Q What color tape were you using?

A Blue tape. After we ran out, we used clear and other colors.

T2

Q How long did that process go on?

A A couple of hours.

Q What time was it completed?

A Around seven in the morning.

Q After all of the bags were completed where were they placed?

A In the room.

Q And when you were all done filling, when all of you were done filling up the bags, what happened next?

A We would take them all out and --

Q Who is "we"?

A Me, Glenn, Rose, Raymond, we would take them and dump them on the table and put rubberbands around them and they contained ten.

Q After you bagged them in groups of ten, what happened to them?

A We would --

Q Who is "we"?

Me, Glenn, Rose and Raymond would throw them in two separate grocery bags.

Q And approximately what time was that?

A We finished about 7 o'clock.

MR. ROSENBERG: Could we have whether that is a.m. or p.m.?

THE WITNESS: In the morning, a.m.

Q Had you slept all during that night?

A No.

Q When you were completed, what happened?

A He said he will see us tomorrow and he took a bag with him and --

Q Who is "he"?

A Glenn, and he said he would leave one behind. He wanted me to deliver it to him at the Roma Gardens that night.

Q And then what happened? What did you do after he left?

A I cleaned up. I put everything in the room and I laid down and my husband came in.

Q And after you talked to your husband what did you do?

A Well, it was night time then and I got in the car and I took the bag down to the Roma Gardens.

Q What bag did you take down to the Roma Gardens?

A It contained quarters of white stuff.

Q Did you leave anything in your apartment?

A Yes.

Q What did you leave in your apartment?

A The bonita, quinine, bags, glassine bags, sifters, tapes.

Q Showing you what has been marked Government's Exhibit 5 for identification, will you look at it. Can you identify it?

A That looks like the bags.

MR. ROSENBERG: May I for the record, so it would be clear to the jury, may the Court advise the jury that these markings were done by the United States Attorney's Office, by Mr. Levine, to clarify at this point that the Court and defense counsel had nothing to do with the marking of that?

MR. LEVINE: I think if the government would not have put these exhibits tag on, we would be forced to wait here.

MR. ROSENBERG: That there have been no court proceedings up to now in reference to these exhibits, and they are merely marked for identification and they are certainly not in evidence at this time.

THE COURT: In case you are wondering about it, ladies and gentlemen, these various exhibits were placed in the envelopes by the government and given identifying marks by the government. Defense counsel did not participate in this project in any way, and the exhibits that have been marked thus far and identified are not in evidence.

MR. ROSENBERG: Thank you, your Honor.

MR. LEVINE: Thank you, your Honor.

BY MR. LEVINE:

Q When you left your apartment with the bag of glassine envelopes that were filled with the white powder, where did you go?

A To the Roma Gardens.

Q And when you got there with whom did you speak?

A Glenn.

Q What did you say to Glenn and what did he say to you?

A He told me to take the bag and give it to a fellow named Sidney next door in the hallway.

Q Did you do that?

A Yes.

Q After you did that, what did you do?

A Iwent back in the bar.

Q Did you have a conversation with Glenn?

A Yes. He told me that he will see me later on, he didn't have no money.

Q What did yousay?

A I said, "Okay."

Q After that conversation with Glenn did you speak with Raymond and Rose?

A Yes.

Q Where did that conversation take place?

A In the Satin Doll

Q What did you say to them and what did each of them say to you?

MR. ROSENBERG: Get a date and time, please.

Q Was it that same evening as the conversation?

MR. WASHOR: I object to the prosecutor giving us the date and time. I request it be given us through the witness.

THE COURT: Yes.

A That is about the 4th of October.

Q In relation to your delivery of those quarters to Glenn, when did this conversation with Raymond and Rose take place?

A After that.

Q Approximately how much in time after that?

A Maybe 12 hours.

Q What did you say to Raymond and Rose and what did Raymond and Rose say to you?

A I told them that --

MR. WASHOR: Objection.

THE COURT: The witness can say what she said to the two of them.

A I told them I didn't get paid for the work I did.

Q And what did Raymond and Rose say to you? Which one?

A Raymond and Rose, they said to me they didn't get paid either.

THE COURT: Did they both say that?

THE WITNESS: Yes.

Q Did there come a time when you talked to Glenn about getting paid again?

A Yes, I told --

MR. ROSENBERG: May we have a time and place, your Honor?

Q When did that take place?

A A couple of days later.

Q Where was the conversation?

A In the Roma Gardens.

Q Who was present?

A Me and Glenn.

Q What did you say to Glenn and what did he say to you?

A I told him that I needed some money, and he said he was having problems moving the package and I would have to wait for it. So the next day he came to the bar, went to the bathroom --

Q Who was present this next day?

A Me and Glenn.

Q Was it in the Roma Gardens?

A Yes.

Q Approximately what time of day was it?

A In the afternoon.

Q What happened that afternoon?

A He went in the bathroom, came out, handed me some money. I went in the bathroom to see how much it was.

Q What did you do when you got to the bathroom? In the bathroom?

A I counted it.

Q And how much money was there?

A About 500.

Q 500 what?

A Dollars.

Q After you counted the money, what did you do?

A He was sitting in the front of the bar and I told him I wanted to talk to him because I didn't think that was fair.

Q What did Glenn say to you?

A He said he didn't want to talk about it no more.

Q Did you leave the bar?

A Yes, I went outside.

Q Where did you go?

A In front of the bar.

Q After you left the premises of the bar, where did you go?

A Downtown.

Q Did you go to your home?

A Yes, then I went home.

Q After you left for your home how long were you at home?

A A couple of hours.

Q After you left home where did you go?

A I went to the health club and I went to dinner and then I drove.

Q Where did you go to dinner?

A 76th and York Avenue.

Q After you left the restaurant where did you go?

A I drove up to the Roma Gardens.

Q And when you arrived at the Roma Gardens who was present inside?

A Glenn, Karen, his wife, his mother-in-law and a few other people.

Q Who was the first person that you had a conversation with?

A Glenn's wife.

Q After that conversation with Glenn's wife, where did you go?

A He just had a fight with his wife --

MR. WASHOR: Objection.

THE COURT: I will ask the jury to disregard that last comment.

Q After your conversation with Glenn's wife, where did you go?

A I went outside.

Q Who was present outside?

A Glenn.

Q Will you please describe to the jury in as much detail as you can what happened at that point?

MR. WASHOR: I would ask for a limiting instruction. I would request a side bar.

THE COURT: Come to the side bar.

(At the side bar.)

MR. WASHOR: At this junction, the conspiracy continuing up to the time of the indictment, I think the jury ought to be apprised that the conduct of any individual where there has been a termination of the conspiracy by any participant is no longer binding upon him. What I mean to say more specifically is as follows: According to the indictment and the overt acts as alleged, the defendant Smith is alleged to have participated in October of 1976 with the conspiratorial scheme as charged. Any acts or action taken by any other co-conspirator subsequent thereto wherein there is no proof that the defendant Smith was a further participant may well terminate her participation in the conspiracy.

MR. LEVINE: Absolutely not, your Honor. That is not the law.

THE COURT: Well, my understanding of the law is that if there is a conspiracy, the conspirators are bound by the acts of all other co-conspirators, at least, during the time the conspiracy continues to exist, and that is so even at any particular moment either early on in the conspiracy or towards its final stages. I do not see any clear indication yet that the conspiracy has come to an end. Presumably, what Mrs. Simpson and Glenn are about to discuss outside the Roma Gardens relates to compensation or division of spoils, which I take it would be within the furtherance of the conspiracy. I don't see any need for a limiting instruction at this time.

MR. WASHOR: Let us assume for the sake of argument there was a dispute between the witness and Glenn as to moneys, that conversation, those acts are not made in furtherance of the goal of the conspiracy.

MR. LEVINE: Absolutely wrong.

MR. WASHOR: It may well demonstrate the problems that exist between co-conspirators, but, surely, the goal of the conspiracy as to this testimony has no relation to the packaging and possession of the narcotics. If any individual co-conspirator should have a dispute or have an argument or have a disagreement with another co-conspirator, that is not a declaration or an act in furtherance of the advancement of the conspiracy. As I understand the law of conspiracy, declarations and acts of a co-conspirator are binding upon the members of the conspiracy, but only when those acts and declarations are made in furtherance of the same. Now, if there is a dispute about it, it may have relevancy to the party that is a co-conspirator and is involved with the conspiracy, but it surely is not binding on the others.

Let us assume for the sake of argument, that she assaulted him -- we could prognosticate from this witness any set of acts done not in furtherance of the conspiracy -- they are not binding on the other defendants.

MR. LEVINE: Mr. Washor misstates the law. A conspiracy is not completed until there is an arrest or there is an affirmative withdrawal by one of the co-conspirators from the conspiracy, and that only ends with respect to that co-conspirator. There is no evidence here that the conspiracy alleged in the indictment is completed. And the possession of the narcotics and what was done with them are clearly acts in furtherance of the conspiracy. The conversation with Raymond and Rose antedates this conversation that Yolanda had with Glenn by maybe a couple of days. The conspiracy is certainly still going on, and the acts and declarations of the co-conspirator in attempting to receive this money are clearly acts in furtherance of the conspiracy.

In United States v. James, 494 Fed. 2d 1007, Which is the D.C. Circuit, the Court there considered exactly this kind of question where the co-conspirator was attempting to realize the monetary gain from the illicit transaction and the Court found that those acts were in furtherance of the conspiracy.

MR. WASHOR: I am familiar with James. The James case had to do with moneys that when received would have to be split among the conspirators, and here you have a unilateral seeking of remuneration by this witness.

THE COURT: Even if that is true, it seems to me a distinction without a difference. My own thought is that these people are businessmen and women, albeit it is a business outside the law. They are not just packaging the stuff and disposing of it for nothing; they are doing it for pay and profit, and I think it is quite clear that subsequent conversations dealing with the question of compensation or splitting the proceeds, and if those conversations are accompanied by disagreement or acrimony, are in furtherance of the conspiracy. I decline to give a limiting instruction.

MR. ROSENBERG: Your Honor, as to the recess --

THE COURT: My thought on that is that when the direct of this witness is over, then there presumably will be some 3500 material and we will have the recess then. I want to finish with the direct and then give counsel sufficient time to consider it.

MR. ROSENBERG: Can we have any idea how much longer it will be?

MR. LEVINE: Not very long.

(In open court.)

MR. LEVINE: Could the reporter read back the last question?

(Last question read.)

BY MR. LEVINE:

Q When you got outside and saw Glenn what happened?

A He said he didn't want to talk to me about anything, and I told him I didn't think it was fair, all the work I did for him and the way he is treating me. So he started arguing with me and pointing his finger in my face.

Q Who?

A Glenn.

2 Q Then what happened?

A So I pushed his hand away and we started fighting. He threw me on the floor and I got up and --

Q What happened when you were on the floor? Will you please describe to the jury in as much detail as you can?

MR. WASHOR: I press my objection regarding these details and this alleged altercation.

THE COURT: No, I am taking the evidence.

Q Continue.

A We started fighting. He started hitting me and I tried to protect myself as much as possible.

MR. ROSENBERG: That is objected to as a conclusion.

THE COURT: I will let the answer stand.

Q Then what happened?

A Then I got in my car --

MR. ROSENBERG: Your Honor, how did she try to protect herself? With a knife or gun? She said she tried to protect herself. That is a conclusion. How did she do it? Did she kick him? What did she do?

THE COURT: The statement that she tried to protect herself is a statement of fact. If you wish to inquire into it, you may do so on cross-examination.

Q What did Glenn do to you?

A He was hitting me and I was raising my hand so he would not hurt me so much and I was trying to hit him back.

Q And when you got up from the ground what did you do?

A I went to my car and I looked in the trunk.

There was a gun there and I pointed it at him.

Q What happened then?

A He told me to go on and shoot him, and I am not that type of person, so I just got in the car and I closed the door and him and a few other people came to the door and started threatening me through the window --

MR. ROSENBERG: Object to what other people did.

Q Just confine yourself to what Glenn said.

THE COURT: You will disregard that evidence.

A Glenn started threatening me through the window, so I rolled up the window and they got him away from the car. I went across the street and called my husband.

Q After you called your husband where did you go?

A I went home.

Q After you returned home, where did you go?

A I went to a hotel.

Q Do you remember the name of it?

A On 161st Street and River Avenue, the Stadium.

Q When you got to the hotel what time was it?

A About 10 o'clock.

Q And what did you do when you got to the hotel?

A I called a friend of mine. Then I called

Glenn from the Roma Gardens and --

Q You called Glenn from where?

A I called him at the Roma Gardens.

Q Where did you make that telephone call?

A Outside the hotel.

Q And then where did you stay that night?

A In the hotel.

Q Did you make any calls while you were in the hotel that evening?

A Yes, a friend of mine.

Q And the following day did you speak to anyone about helping you?

A Yes.

Q Who was that?

A Warren Sims called me.

MR. WASHOR: Objection as to any conversation between Sims and the witness.

MR. LEVINE: The witness can testify as to what she said. That is all the government will bring out.

MR. ROSENBERG: I object. What she said to someone else in the presence of any of the defendants is a rehash of what may have happened in her thoughts. I don't think that is proper testimony, your Honor. A witness can conveniently speak to anyone and say what she said, even though it may not have any bearing or nothing to do with the case. I don't think she should be permitted to testify as to what she said to Warren Sims. May I have a side bar?

THE COURT: Yes, I will take an offer of proof at the side bar.

(At the side bar.)

MR. ROSENBERG: What I am concerned about is the witness is now about to describe a conversation with Sims in which she, in essence, recapitulates or repeats testimony which is already given.

MR. LEVINE: I think this may be one of Mr. Rosenberg's typically long objections to the jury. The government admits Simpson could testify to the full conversation she had with Warren Sims. The conspiracy is not over and these are statements by a co-conspirator. This witness is a co-conspirator and has entered a plea of guilty in this case. Actually, those conversations with Sims are recorded conversations which have been made available to the defendants a long time ago. The government intends to offer them in this trial, not through this witness. The government intends to merely ask this witness to summarize in one sentence what the substance of that conversation was, just so it would be clear to the jury at a later time when the government offers the recorded conversations that this witness had and that this witness had not deliberately failed to tell the jury that those conversations were taking place. The government will cross the bridge of the admissibility of those conversations perhaps at a later date.

The government has prepared a memorandum of law on the subject that fully supports the admissibility of all those conversations.

MR. ROSENBERG: Your Honor, this is exactly the point I make, and there is certainly going to be some legal argument as to whether or not the conversation, the taped conversation between Sims and her will be admissible.

Now, in a talk between two co-conspirators, talking on the telephone where he was set up by the agents to make the call, this being a taped conversation with the consent of Sims, there is a very serious question. Certainly, it has to be argued at length as to whether or not that particular tape can be introduced in evidence. She is not a defendant in the case. Sim is not a defendant. It is self-serving. It has no basis here.

MR. LEVINE: No more self-serving than this witness's statements to other people in this case.

MR. ROSENBERG: Now he is talking about a conversation with two people who are not defendants in the case.

THE COURT: If there are questions as to the admissibility of the substance of that particular telephone conversation -- and defense counsel indicate that there are questions, at least, in their minds as to admissibility -- it seems to me I must either rule upon it now or else simply limit the examination of this witness to an identification of the fact of the telephone conversation.

MR. LEVINE: The government in order to move the trial along will merely ask that question and raise it at a later point. But the government does not concede in any way that the substance of that conversation is not admissible against these defendants here.

THE COURT: I understand that.

MR. ROSENBERG: At the beginning there was a side bar and we discussed it and I asked Mr. Levine if he was going to introduce any of the tapes through this witness and he said no.

MR. LEVINE: That is right.

MR. ROSENBERG: It should be limited to the fact that she spoke to him, and that should be it.

THE COURT: I think it is going to be quite limited. I think we all understand.

(In open court.)

BY MR. LEVINE:

Q The following day did you have a conversation with Warren Sims?

A Yes.

Q And a couple of days after that did you have another conversation with Warren Sims?

A Yes.

Q Were you arrested in March of this year?

A Yes.

Q At the time of your arrest did you have certain quantities, small quantities of marijuana in your possession?

MR. WASHOR: Objection.

THE COURT: In March, did you say?

MR. LEVINE: That is right.

THE WITNESS: March 25.

THE COURT: I will permit the answer.

Q Will you answer?

A Yes.

Q Following your arrest did you agree to cooperate with the government?

A Yes.

MR. WASHOR: Your Honor, I have a side bar objection.

THE COURT: I will take this testimony, Mr. Washor.

Q And some time after you agreed to cooperate with the government, did you?

MR. ROSENBERG: Your Honor, may we have a date as to what time she entered into the agreement with the government to cooperate? Mr. Levine should have that.

THE COURT: If you are all patient it may emerge. If not, we will develop it further.

MR. ROSENBERG: If we are going into that cooperation, we should have an exact date. I will accept Mr. Levine's statement when he had her in his office and she agreed to cooperate.

THE COURT: At this point I will permit the evidence to come in as the government wishes it.

Q After you were arrested on that day did you agree to cooperate with the government?

A Yes.

Q And some time thereafter did you and your lawyer execute an agreement with the United States setting forth the terms of your cooperation with the government?

A Yes.

Q Showing you what has been marked as Government's Exhibit 7 --

MR. ROSENBERG: Will your Honor bear with us while we look at it?

THE COURT: Yes.

(Pause.)

Q Showing you what has been marked Government's Exhibit 7 for identification, do you recognize it?

A Yes.

Q What is it?

A My agreement.

Q Is it a copy of the agreement that you signed?

A Yes.

MR. LEVINE: Your Honor, the government offers Exhibit 7.

MR. ROSENBERG: Objected to. It is an agreement solely between this defendant and the government. It has no bearing in the testimony; it goes to no validity and serves no purpose in this trial, whatever she agreed with the government in order to cooperate.

I think her testimony is clear that she agreed to cooperate, and the agreement states a lengthy agreement between them, and I don't think it has any place in the evidence.

THE COURT: I think for the jury to be fully aware of whatever agreement may exist between the government and this witness.

MR. WASHOR: It is hearsay and I will have an exception. This is an agreement with the United States Attorney and this witness and it puts us in the position where there is a deprivation of confrontation.

MR. ROSENBERG: May we see it now?

THE COURT: You want to see it again?

MR. ROSENBERG: I want to see the details. He is offering it in evidence.

THE COURT: Show it to them again, please.

(Pause.)

MR. WASHOR: The letter is written to an attorney --

MR. LEVINE: Your Honor --

MR. WASHOR: One second.

MR. LEVINE: Can we approach the side bar?

THE COURT: Just look at it yourselves, gentlemen, and pass it up to me.

MR. WASHOR: I press my objection.

MR. ROSENBERG: I would ask for a side bar, your Honor.

THE COURT: Let me see it.

MR. ROSENBERG: May I ask that Mr. Levine not wave his hand in disgust. It is the first time we have seen it. We are entitled to see it.

THE COURT: Read it, Mr.Rosenberg.

MR. ROSENBERG: I would ask your Honor to instruct him not to do those things.

THE COURT: Read the document. I would be grateful if you will read the document.

MR. ROSENBERG: Your Honor, to begin with --

MR. LEVINE: If Mr. Rosenberg is going to take objection to this document, which at this time is not in evidence, I think we ought to go to the side bar.

MR. ROSENBERG: Your Honor, this is not the original. I would like to see the original. This has no signatures on it.

MR. LEVINE: As the Court knows, the original is under court seal.

THE COURT: Let me see the document.

MR. ROSENBERG: May we see the original, Judge?

THE COURT: Where is the original, Mr. Levine?

MR. LEVINE: It is under court seal. I have a carbon copy of the original. Your Honor, can we approach the side bar?

THE COURT: Come up.

(At the side bar.)

MR. LEVINE: The letter agreement is the standard form of letter agreement between cooperating defendants and the government. This copy has been redacted from the original to omit that portion of it which provides for the protection of this witness because of fear from the defendant, which in fairness to the defendant the government has redacted out, and if the defendants have no objection to the agreement in full going in evidence, the government will provide an unredacted copy.

MR. ASHOR: In candor, Mr. Levine, this should have been disclosed to us. I realize the good intentions of the government, but I think we have a right to look at it and to make a unilateral decision.

MR. LEVINE: No, your Honor.

MR. ROSENBERG: That is not a conformed copy. I can understand a photocopy.

MR. WASHOR: I press the objection, because if they have made any promises --

MR. LEVINE: The letter agreement sets forth what the government agrees to do.

THE COURT: What is the basis of the objection? Do you want the ori[illegible] The full copy?

MR. ROSENBERG: I [illegible]d like to see it, Judge.

MR. LEVINE: The Court has it.

MR. GRISORIO: May I make objection on behalf of the defendant Brown on the grounds that it is incompetent, irrelevant and immaterial? It has nothing to do with the conspiracy or anything charged in the indictment. It is an agreement between this witness and the government.

THE COURT: Well, I am going to receive this in evidence. If counsel wish to see the original, I will permit them to do so and take out out of seal. I will entertain at a later time a motion to strike this exhibit if any questions arise after comparing it with the original. In the state of the present record it is appropriate to offer it in evidence.

MR. ROSENBERG: There are no signatures.

MR. WASHOR: Can we offer the entire letter?

THE COURT: I am going to have shown to counsel the original letter, and having done so I will then entertain a motion to strike this exhibit. On the present record I am going to let this redacted copy in.

(Continued on next page.)

(In open court.)

(Government's Exhibit 7 was received in evidence.) xxx

Q Showing you what has been marked Government's Exhibit 8 for identification --

(Government's Exhibit 8 was marked for identification.) xxx

Q Ms. Simpson, were you some time after you agreed to cooperate indicted in this case?

A Yes.

Q Showing you what has been marked Government's Exhibit 8 for identification, do you recognize it?

A Yes.

Q What is it?

A What I said.

Q This Government's Exhibit 8, please look at it.

You can't tell the jury what it says. Just identify it, please.

MR. ROSENBERG: If she can, your Honor.

THE COURT: If she can't, she won't.

Q Do you recognize that document today, Ms. Simpson?

A Yes.

Q What is it?

A What I agree I did.

MR. LEVINE: Your Honor, at this time the government would like to read Exhibit 7 to the jury.

THE COURT: Very well.

Q Ms. Simpson, what is the name of your lawyer?

A Murray Mogel.

Q This letter is addressed to Murray Mogel, Esq., Federal Defenders Services Unit, Re: Yolanda Valdez Simpson:

"Dear Mr. Mogel:

"On the understanding specified below, the United States will accept a guilty plea from Yolanda Valdez Simpson to Count 1 of Indictment 77 Cr. 340 charging violations of 21 USC Sections 841 and 846, carrying a maximum sentence of 15 years imprisonment and a $25,000 fine and three year minimum special parole.

"If she fully complies with these understandings, Yolanda Valdez Simpson will not be prosecuted by this office for the remaining count in this indictment or for potential charges based upon information supplied to this office by Yolanda Valdez Simpson.

"The understandings are that Yolanda Valdez Simpson shall truthfully disclose all information with respect to the activities of herself and others concerning all matters about which this office inquires of her and further shall truthfully testify before the grand jury and/or at any trial or other court proceedings with respect to any matters about which this office may request her testimony.

"It is further understood that the sentence to be imposed upon Yolanda Valdez Simpson is within the sole discretion of Judge Haight. This office cannot and does not make any promise or representation as to what sentence Yolanda Valdez Simpson will receive nor will it recommend any specific sentence to Judge Haight.

"However, this office will inform Judge Haight and the Probation Department, number one, of this agreement; number two, the nature and extent of Yolanda Valdez Simpson's activities with respect to this case; and number three, the full nature and extent of her cooperation with this office; and four, all other information in its possession relevant to sentence.

"It is further understood that this agreement is limited to the United States Attorney's office for the Southern District of New York, and cannot bind other federal, state or local prosecuting authorities, although this office will bring her cooperation to the attention of other prosecuting offices if requested.

"It is further understood that Yolanda Valdez Simpson must at times give complete truthful and accurate information and testimony and must not commit any further crimes or should it be judged by this office that Yolanda Valdez Simpson has given false, incomplete or misleading testimony or information or has otherwise violated any provision of this agreement, this agreement shall be null and void and Yolanda Valdez Simpson shall thereafter be subject to prosecution for any federal criminal violation of which this office has knowledge, including but not limited to perjury and obstruction of justice.

"Any such prosecutions may be premised upon any information provided by Yolanda Valdez Simpson and such information may be used against her.

"No additional promises, agreements and conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signe by all parties."

That agreement is signed, "Very truly yours, Robert B. Fiske, Jr., United States Attorney, Alan Levine, Assistant United States Attorney, Approved, Elkan Abramowitz, Chief Criminal Division, Agreed and Consented to by Yolanda Valdez Simpson," and signed by and approved by Murray Mogel, attorney for Ms. Simpson.

Q Ms. Simpson, before you signed this agreement, did your attorney go over what was in this agreement?

A Yes.

Q Did he explain it to you in detail?

A Yes.

MR. ROSENBERG: That is objected to.

Q Then what did you do? Did you sign the agreement?

A Yes.

Q Did you enter a plea of guilty to Count 1 of this indictment?

A Yes.

MR. LEVINE: No further questions at this time.

THE COURT: Mr. Levine, you have some material to deliver to defense counsel.

MR. LEVINE: I do, your Honor.

THE COURT: Ladies and gentlemen, this will be an appropriate time I think for you to take a break. Stay in the jury room, please. I am not quite sure what the next schedule will be, but you excuse yourselves now and relax and I will send word to you shortly.

(The jury left the courtroom.)

THE COURT: I have before me the sealed envelope containing the original letter of agreement between the witness and you. My understanding is that the government does not object to that document being removed from its sealed condition so that it may be examined by defense counsel.

MR. LEVINE: No, your Honor.

A Yes.

Q Who showed them to you?

A Mr. Levine.

Q Was there an agent there?

A I am not sure.

MR. ROSENBERG: Will your Honor bear with me just a moment?

THE COURT: Yes.

(Pause.)

Q It would be fair to say, would it not, that when the strainers and plastic bags and all were found, wherever they were, by the agents you were not present?

A Right.

Q Did you ever have cocaine in the house?

A What house?

Q Your apartment? Where you lived?

A When the three of them came they brought some.

MR. WASHOR: I didn't hear that answer.

THE WITNESS: When Glenn, Rose and Raymond came they did bring some cocaine.

Q How much?

A I don't know.

Q Did you tell that to Mr. Levine when you spoke to him?

A I am not sure.

Q As you sit there to the best of your recollection did you ever tell him anything about cocaine?

A I told him -- not him -- I think I told the agents that these people did bring some cocaine.

Q Did they use that cocaine that day?

A Yes.

Q Did you use some of it?

A No.

Q Never sniffed cocaine?

A No.

Q Now, in the apartment, in your apartment the last time you were there that you testified with the three defendants here what did you do -- let me withdraw that.

You got there with Mr. Knuckles first? Is that correct?

A Yes.

Q You testified, did you not, that you assisted or worked with the mixing and getting everything ready? Is that right? Mixing these powders?

A Yes.

Q You helped Glenn?

A Yes.

Q Do you remember giving Mr. Levine a statement

UNITED STATES OF AMERICA
vs.
MARION KNUCKLES a/k/a "GLENN", 77 Cr. 340
RAYMOND BROWN and ROSE SMITH,
Defendants.

By Direction of the Court
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to be reproduced.

New York, July 13, 1977;
9.40 A.M.

Trial resumed.

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THE COURT: Gentlemen, we have met in chambers this morning to consider one question that was left open yesterday in our discussion of the charge to the jury and the relationship that the charge to the jury should and necessarily does have upon counsel's summations. That question in essence dealt with whether there was a possible variance between the charge and the indictment and the proof at trial, and if such a variance existed, what the appropriate charge to the jury on the subject should be.

I have considered this question carefully and done some research. I will hear any further comments that counsel may wish to make before delivering judgment on this point. I am going to state my ruling briefly for the sake of time. I intend to prepare a rather detailed opinion giving legal reasons for it because I think that would be helpful, but I'm not going to recite the reasons and the cases and the citations and the quotations at length on this record because I think we have to move along.

However, before giving judgment I will listen to any additional submissions.

MR. LEVINE: The government has filed a memorandum of law with the Court and all defense counsel on the subject and the government relies on its memorandum.

THE COURT: The government takes the position, I think, that variance, if it exists,affects neither the first nor the second count of the indictment. Is that correct?

MR. LEVINE: That is correct.

MR. ROSENBERG: Your Honor, it is clear that in the Ramirez case the indictment showed the violation of Schedule I and II. There was proof only submitted to the jury as to cocaine and that was not considered a fatal variance that was clear. In other words, the grand jury had both schedules. In this case the grand jury did not have both schedules. They only had the one involving heroin.

Your Honor, your law clerk has advised me that you are familiar with the Strione case and in that case there was a reversal. The Court held that was basically an amendment to the indictment and it could not be done.

THE COURT: Were narcotics involved in that case?

MR. ROSENBERG: No, your Honor. It involved a labor dispute, a bribery, and the government put through two theories, I believe one that the sand could not be shipped, and then they put through the theory that the sand had to be shipped in order that they could manufacture steel from the sand, and all they proved was the latter, but not the first. But the Court held that those theories were not before the grand jury and therefore that was improper. It wasn't a variance from the larger to the lesser.

I believe, if I recall it correctly, that it was more or less two different theories. I believe yesterday Mr. Washor quoted part of it which stated that decision; is that right?

MR. WASHOR: Well, paraphrased is better than quote. I will comment when you have completed.

MR. ROSENBERG: I'm finished.

MR. WASHOR: My premise that I have tried to urge upon the Court is the fear that the accused, indicted for one crime, could well be convicted for that with which he is not charged, although proven.

Strione cites the case that was decided before I believe I studied law, the Bain case. The premise in Bain is that the grand jury by its very function are the peers of the accused and that the individual shall not be tried or held to answer for a charge that has not been lodged against him.

I could understand now that during the course of the grand jury presentation if evidence was presented to said grand jury demonstrating the possession, the intent to distribute, blanketing any narcotic drug for both heroin and cocaine, and the grand jury brought an indictment as described in Count 2 charging merely distribution or possession with intent to distribute heroin, then in fact the variance between the proof in this case and the enumerated charge would not really prejudice the accused to the extent that they might well be vindicted of a crime for which they are not charged.

There are certain types of procedures which would fall into these acts where in fact the accused would be prejudiced more hypothetically or theoretically than in actuality. But if the Court bears in mind what has happened in this case as disclosed during the course of the trial, there should be and can be no question that the only evidentiary matter presented before the grand jury was that the substance in question that forms the gravamen of both charges is that of narcotics Schedule I, heroin. The indictment so charges that.

The defendants answered that indictment and prepared the answer to that indictment. Then during the course of the trial a serious legal issue raises its head as to whether or not the substance in question is heroin or is another substance, cocaine.

If the defendants can intelligently and reasonably argue that the substance in question was not heroin, then the variance goes directly to that which was presented before the grand jury. I believe that it is a defense and I believe also watered down to its narrowest it is a reasonable and proper argument to present to a jury.

I will give your Honor an analogy, if I may: we have bribery sections. I believe it is Section 201 with various subdivisions. One section is defined or imposes a penalty of 15 years, bribery upon a public official, I mean, that what an accused were charged with by indictment and during the course of the trial there was a variance to the extent, A, that in fact moneys were given to the public official but there was no quid pro quo for the giving of moneys as would be mandated by the bribery section -- I think it is 201-F, if I'm correct -- in fact, the defendant may have committed another crime bestowing a gratuity upon a public official, which is another section. I think it is 211 or 210 or 209 -- that variance in that type of situation, although demonstrating that the accused committed a separate and distinct crime should not and ought not be substituted for the crime charged, there being in the first instance no evidence before the grand jury relative to the second crime not charged but proved.

Secondly, the defendant at the juncture of going to the jury - not pretrial, but at that juncture of the proceeding, is at a horrible disadvantage, because he is now defending by final argument a potential defense, that crime which he was not charged with.

I think it is clear that you could not amend a bribery indictment to include or act as a substitute to comply with any variance in proof bestowing the gratuity upon a public official.

In the same vein, where an accused is charged with possession with intent to distribute, it is a very personal crime, personal to the extent -- I'm talking about the substantive statute -- that possession must be spelled out either constructively or actually. It is an accessorial type of crime as is the conspiracy charge where the underlying substance may in and of itself not have the same value, bearing in mind what the purpose of the conspiracy statute is directed against, bearing in mind what the possession with intent to distribute statute is directed against.

I think that as to the second count of the indictment charging the substantive crime, failure of the government to allege more than the one narcotics schedule, failure of the government to satisfy this Court that evidence of Schedule II narcotic drug was before the grand jury, we cannot accept the variances being ministerial in nature where the defendants had a right to assume, as charged in the indictment, as amplified by the informal bill of particulars and discovery that preceded the trial hearing that the proof to be offered was heroin - that being the basis, I would suggest, one, that the second count should be dismissed or the alternative being, if the Court should find there still may be a question of fact as to the nature of the substance, that the jury be charged that in the event the government has failed to prove that it is, the substance is heroin beyond a reasonable doubt -- since the gravamen of the charge is possession of the substance, then they must acquit the defendant.

I am not proffering to the Court that your Honor charge that if they find that there was cocaine per se they must dismiss. They may reach the conclusion that it was not cocaine. They may reach the conclusion that it was milk sugar. They may reach the conclusion that there was merely bonita and quinine and that the government failed to prove by circumstantial evidence that the substance was heroin.

I believe consonant with what the Court would charge normally before we raised the question, your Honor would have been obligated to charge the jury that the government has the onus of proving beyond a reasonable doubt that the substance in question was a narcotic Schedule 1 drug as defined in the indictment. I think that would be a normal charge as to one of the elements.

Surely, your Honor, if there was no proof circumstantially or direct of what the substance was, this Court would be obligated to dismiss that count in the indictment.

The government urges upon your Honor that there is circumstantial evidence that the substance was heroin, to wit, satisfying the element that it is a narcotic drug in violation of the law. What we are really asking you to do here on behalf of the defendants is to specifically point to the fact that if the jury should find that the substance was not heroin beyond a reasonable doubt, they are obligated to acquit. There is nothing really that constitutes a nuance in our request. I'm not asking, if you reach that conclusion, to charge the jury that the substance being cocaine would constitute an absolute defense. I'm suggesting that you would be obligated anyway to tell the jury that the government must prove beyond a reasonable doubt that the substance is a narcotic Schedule I drug. But I think in fairness to the accused that you ought to elaborate that they must prove beyond a reasonable doubt that it is heroin, because that is what they are charged with.

I don't think it is fair in analyzing an indictment where people are accused of such serious crimes that these kind of options, alternates should be left open to the government: if we can't prove heroin we can prove cocaine; if we can't prove cocaine, maybe we can prove methadone; if we can't prove methadone, maybe we can prove morphine, which is a redacted form. If we can't prove the morphine, let's prove the possession of opium.

I think it is unfair. The whole point of delineating the charges, the whole point of having discovery and inspection and having bills of particulars and describing the very items and amplification of what the accused is charged with so the accused can meet those charges is overcome by that.

MR. GRISORIO: May I be heard, your Honor?

THE COURT: All right.

MR. GRISORIO: My research did not disclose any case on all fours. However, assuming that your Honor rules in favor of the government it would be interesting to all of us here to know what instructions your Honor would give to the jury if they came back with the question: we could not find any heroin. We could not find cocaine or some other substance.

MR. LEVINE: Your Honor, I think Mr. Washor was being very cute in his legal arguments for this reason: the request that they asked for yesterday was not supported in the law to argue to the Court this morning and really what they want is a charge to the jury that the jury must find proof beyond a reasonable doubt that the defendants possessed with intent to distribute heroin.

I think it is clear that the Court has an obligation as a matter of law to charge the jury on the essential element of the crime. It is true that one of the essential elements of the crime here is the possession with intent to distribute of a narcotic-controlled substance, to wit, in this case, heroin.

What the defendants wanted yesterday was a charge that if the jury found that the drug-controlled substance was cocaine, they must acquit. I think that is unsupported by the law, your Honor, and the government's memorandum of law sets that forth.

The government submits that a charge to that effect at least initially is not needed.

Secondly, Mr. Washor's analogy to the bribery or gratuity statute is plainly unsupported by the law in this Circuit, your Honor. It is clear that an indictment charging bribery may be sent to the jury with a charge from the Court that if they found a gratuity, which is as defined in the law a lesser-included offense of bribery, that they may convict on the gratuity count. So, his reliance on that analogy to support his proposition just isn't supported by the law in this Circuit.

Finally, your Honor, I think the case with the defendants here suggests to the Court that there is no evidence in the record of possessing with intent to distribute heroin, and I think the Court has properly stated that it is clear that there is circumstantial evidence in the record from which the jury can infer that there was possession with intent to distribute heroin. What is clear is that there is scant evidence in the record that there was possession with intent to distribute cocaine.

I think if the defendants decide that they want to proffer that argument to the jury, as the government said, let them. They are entitled to make whatever argument to the jury they wish. That is the legal defense to which the memorandum of law was directed. That was the claim made in these chambers yesterday afternoon.

MR. WASHOR: If I may respond for a moment, the government's reasoning power regarding the bribery situation should really alert the Court. If I may say, I was hoping that they would answer it as they did.

Bestowing a gratuity upon a public official is a lesser degree of the crime charged. It is inclusive in the higher degree with an element of the crime not having been proven, to wit, quid pro quo. It is readily understandable and reasonable to believe and legally logical that if the major crime is not established a lesser-included crime having some but not all of the elements originally charged can be given to a lay jury to determine factually what verdict to bring in.

If you follow the government's argument it is self-defeating when applied to the second count in the indictment, because the proof of cocaine, when there is an allegation of heroin, is not a lesser-included crime. It is a separate, distinct charge, not merely by statute but by evidence and by consequence, so the argument advanced by the government, if accepted by you, should then demonstrate that the variance in this case is not quite as -- is more severe than a variance where the government fails to prove a requisite element of a major charge and the government and the Court has authority to submit a lesser-included offense.

Your substituting or allowing a substitute for that which has been shown to the grand jury, that which acted as the predicate for an indictment, that which has been charged in the indictment, that which has been given to the defense to answer for that which has been proved at trial.

THE COURT: A last word to you, Mr.

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DIRECT EXAMINATION

BY MR. LEVINE:

Q Mr. Brophy, how are you employed?

A I am employed by the Department of Justice, United States Department of Justice, as a special agent for the Drug Enforcement Agency.

Q For how long haveyou been so employed?

A Approximately five years.

Q Directing your attention to May 6, 1977, were you on duty that day?

A Yes.

Q And did you and another investigator arrest the defendant Marion Knuckles who is also known as Glenn?

A Yes.

Q What happened at the time of his arrest?

A At the time of his arrest, he was transported to the regional office of the Drug Enforcement Administration. The arrest processing took place, and then he was transported to the U. S. Attorney's office for his pre-arraignment interview and arraignment.

Q Before he was brought down to the offices of the United States Attorney, did you tell him anything?

A Mr. Knuckles subsequent to his arrest was advised of his constitutional rights.

A 96b

Q By whom?

A By myself as witnessed by another investigator.

Q What was he specifically told about those constitutional rights?

A He was advised that he had the right to remain silent, he was further advised that anything he said could and would be used against him in a court of law. He was advised that he had the right to a lawyer and if he could not afford a lawyer, one would be appointed by the court or the United States Magistrate and he was advised that if he did not wish to have a lawyer present, he could waive these rights and be interviewed but he could stop the questioning at any time he wanted to.

Q After he came to the offices of the United States Attorney, what was told to him?

A He again was advised of his rights and the charges which he was arrested for.

Q Who was present at that time?

A At that interview was the Assistant United States Attorney, Investigator Curtis of the New York State Police and myself.

Q What rights was he advised of at the outset of the interview?

A He again was given basically the rights I mentioned by the Assistant U. S. Attorney.

Q What did he state that his name was?

MR. WASHOR: Excuse me, your Honor. At this point since it is subsequent to the arrest, I think a proper admonishment should be that any statement made by any co-defendant at counsel table at this point and juncture cannot be binding on the defendant Smith, post-alleged conspiratorial statement.

MR. GRISORIO: I join in that motion on behalf of the defendant Brown.

THE COURT: I think that is an appropriate instruction. Let me explain to you what that is about, ladies and gentlemen.

There is a rule of law, I believe I adverted to it earlier, that if a conspiracy exists, statements made by one of the conspirators during the lifetime of the conspiracy and in furtherance of the purpose of the conspiracy are binding and may be considered by you not only with respect to the person who makes the statements, but also with respect to any other conspirators.

But once an arrest has been made, the conspiracy may and should be regarded as over, so consequently, any declarations or statements made by Mr. Knuckles from that point forward as to which you may be about to hear evidence, may be considered by you in your weighing of the evidence against Mr. Knuckles, but may not be considered by you in connection with any other defendants or alleged co-conspirators.

MR. ROSENBERG: Your Honor, may I ask that in view of that instruction, that the witness Yolanda Simpson is a co-conspirator here but not a co-defendant?

THE COURT: That is the fact, Mr. Rosenberg, but it does not affect in any way the instructions I have just given to the jury.

MR. ROSENBERG: I mean to follow through.

THE COURT: I see no need to amplify or clarify what I just said.

Go ahead, Mr. Levine.

Q Did he state his name?

A Yes.

Q What was that?

A Marion Knuckles.

Q Did he state whether he was known by any other name?

A Yes.

Q And what was that?

A Glenn.

Q Did he state where he was living at the present time?

A Yes.

Q Where was that?

A 1580 Park Avenue, New York, New York.

Q Did he state whether he had any other address?

A Yes.

Q Where was that?

A He said he had another residence in South Carolina.

Q Did he state what his previous address was?

A Yes.

Q Do you recall what that was?

A I believe it was 301 East 87th Street in Manhattan.

Q Did he state whether he was employed by anyone?

A Yes.

Q What was that?

A Self-employed.

Q Do you recall where he said that was?

A An amusement center in South Carolina named Penny Arcade.

Q Then was he asked other questions concerning any mental problems, any physical problems, place of birth?

A Yes.

Q After the questions were over, was he then told again that he had been arrested for narcotics and asked whether --

MR. ROSENBERG: I object to the leading at this point, your Honor.

THE COURT: I will permit it at this stage.

Q Was he then told that he was arrested for narcotics and asked what he had done with narcotics? Yes or no.

A Yes.

Q What did he state?

A Mr. Knuckles also stated that he hadn't done -- in essence he stated he hadn't done any heroin in over two years and didn't intend to do any.

Q Then was he asked whether or not he wanted to sign the statement?

A Yes.

Q What did he say?

A He did not wish to sign anything without a lawyer present.

Q Directing your attention to May 3, 1977, were you on duty on that day?

Magistrate or the court, that she could talk to us but if she wished to stop the questioning at any point she could.

Q After processing, was she brought down to the offices of the United States Attorney as well?

A Yes.

Q At that time who was present?

A At that time the Assistant United States Attorney was present, Investigator Curtis from the New York State Police and myself.

Q At the outset of the interview, what was Miss Smith advised?

A She again was advised of her rights.

Q What were they?

A That she had the right to remain silent, that anything she said could and would be used against her in court or some other proceeding, that if she had -- couldn't afford a lawyer or didn't have an attorney, one would be appointed by the United States Magistrate or the court, if she wished to speak to us she could but she could cease answering the questions at any time.

Q Then did the Assistant United States Attorney proceed to interview Rose Smith?

A Yes.

"Q LSD?

"A No.

"Q Do you or your spouse have any bank account?

"A No.

"Q Cash on your person?

"A Nothing.

"Q Are you a citizen of what country?

"A The United States.

"Q Place of birth?

"A Atlanta, Georgia.

"Q When were you arrested?

"A 5/3/77. A.M.

"Q Where?

"A Residence.

"Q Do you have any complaints about the way the agents treated you?

"A No.

"Q Would you like to tell me what happened?

"A I went to the table with other persons and Yogi at 626 Riverside Drive apartment. We worked all night. We mixed over a couple of thousand quarters. I don't know how many more. I helped other persons do other packages at the apartment at 319 West 116th Street. All packages were heroin. One of the people didn't pay me for working for that person."

Question by the U.S. Attorney:

"This is what you told me before?

"A Yeah.

"Q Is this the truth?

"A What I said is the truth."

It is signed "Rose Smith, 5/3/77" and under the signature is "I am doing this on my own. No one made me do it." And it is signed again, "Rose Smith. Time interview terminated, 11:35 a.m. Witnessed by the Assistant United States Attorney, Special Agent John C. Brophy and another investigator."

BY MR. LEVINE:

Q Mr. Brophy, were you also on duty on April 19, 1977?

A Yes, sir.

Q Did you talk to an individual by the name of Robert Simpson?

A Yes.

Q Did you show him a consent form to search an apartment?

A Yes.

Q Did he sign it?

A Yes.

MR. LEVINE: Can we mark this Government's Exhbit

THE COURT: All right, cross examination.

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CROSS EXAMINATION

BY MR. ROSENBERG:

Q Agent Brophy, the exhibits that were found in the kitchen, the strainers and the other paraphernalia, wouldit be fair to say that they were distributed in cabinets and up on shelves and all through the kitchen?

A May I explain?

Q Yes. Explain to me where they were.

A We found approximately six of the sifters in one part of the kitchen.

Q Well, they are strainers, aren't they?

A Strainers, sifters, same thing, and measuring spoons in another area in the kitchen.

Q In the kitchen?

A Yes.

Q They were there among dishes, pots?

A With other utensils.

Q Sort of mixed in with other kitchen utensils, right?

A Yes.

Q The pink bag, Exhibit 2, I believe, when it was given to you, did you have it processed for fingerprints?

A No.

Q In other words, that bag inside and out was never processed for fingerprints?

A Not for fingerprints.

Q What was it processed for?

A It was processed, chemical analysis to see if there were any traces of a controlled substance.

Q There were none, is that right?

A No.

Q In other words, that pink bag had no traces of a narcotic drug, is that right?

A Yes, that's correct.

Q When you questioned Mr. Knuckles after his arrest, he said to you after a point, "I don't want to sign anything until I see a lawyer," right?

A Yes.

Q And he didn't sign the statement which was written, is that correct?

A Yes.

Q Did you write these statements or did someone else?

A The Assistant United States Attorney wrote the statement.

Q It is definite, is it not, that the statement

Q On page 1, white and pink plastic shopping bag, was that submitted?

A Yes.

Q That is an item in evidence, am I correct?

A Yes.

Q Page 2. Metal sifter with white plastic handles and blue plastic handles?

A Yes.

Q Am I correct?

A Yes.

Q Following page, metal sifter, metal sifter with an orange plastic handle, two items submitted, am I correct?

A Yes.

Q By the way, before we go any further, all those items were tested by the laboratory, am I correct?

A Yes.

Q And the tests that were performed at the laboratory were for the purpose of determining the presence and/or traces of a narcotic substance, am I correct?

A Yes.

Q And the narcotic substance for which they were tested happend to have been heroin, am I correct?

A Yes.

Q So that when these items are submitted, they are not submitted so that the laboratory expert just arbitrarily guesses as to what they should test for, am I correct?

A Yes.

Q So that they were submitted for the purpose of determining whether or not a narcotic substance under the narcotic control laws, more particularly heroin, existed, am I correct?

A Yes.

Q On all the particular items that we have just mentioned now that were submitted for analysis, is it not a fact that no controlled substance was found to be present?

A Yes, sir, that is what the chemist says in the report.

Q What that means, does it not, is that there is absolutely no trace on those items of the existence of heroin, am I correct? Heroin hydrochloride.

A I think it encompasses more, it says no controlled substance detected.

Q That is even more than just no heroin hydrochloride, am I correct?

A Yes.

Q Let's go on to the next page. During the course of the laborabory analysis, government's facilities have sophisticated laboratories, do they not, to your knowledge?

A Not being a chemist, I would say yes.

Q So when they test for heroin sometimes if they can't find heroin they could find something else?

A Yes.

Q On the very next page, was not a metal sifter with blue plastic handles submitted?

A Yes.

Q And in fact, they tested for heroin in that, did they not?

A Yes.

Q And instead of finding heroin, please tell this jury what they found.

A Metal sifter with blue plastic handles, DEA Exhibit No. 8, reveals cocaine.

Q Now?

A Traces of cocaine.

Q I apologize. I didn't mean to interrupt your answer. In addition to which there was another metal sifter that was submitted and that came back no controlled substance, am I correct?

A Yes.

MR. LEVINE: Your Honor, I think that perhaps Mr. Washor could ask the witness questions and have him testify from his recollection. The witness is reading from a document that is not in evidence at this time.

THE COURT: That is true.

Q I will ask the witness. Do you have an independent recollection of the results of each item that was submitted?

A Yes.

Q Would you please close the page, follow the suggestion of the United States Attorney.

Was a metal measuring spoon bearing inscription one teaspoon submitted?

A Yes.

Q For testing for heroin?

A Yes.

Q And was any controlled substance found?

A You would have to give me the DEA exhibit number for me to remember.

Q Do you remember the DEA exhibit number?

MR. LEVINE: Why doesn't he show the witness the exhibits that are in evidence.

MR. WASHOR: I have the report. I am trying to do this as quickly as possible. He objected to him looking at it.

THE COURT: The report isn't in evidence.

MR. WASHOR: He is using it to refresh his recollection.

THE COURT: The witness may use it to refresh his recollection.

Q Would you turn to the following page where Exhibit No. 10 is submitted?

A Yes.

Q Would you look at that page and see if it refreshes your recollection as to Exhibits 10 and 11?

A Yes.

Q Were metal measuring spoons with inscription one teaspoon and a copper spoon with an inscription one teaspoon submitted for laboratory anslysis for testing for the determination of the existence of traces of heroin?

A Yes.

Q Were there -- was there an analysis that was made?

A Yes.

Q What is the result of that analysis to the best of your recollection?

A No controlled substance detected.

Q Would you be kind enough to turn the page and look at the following page, look at it to see if it refreshes your recollection.

A Yes.

Q In fact at the very same time there was a white plastic measuring spoon bearing inscription one-quarter teaspoon submitted for laboratory analysis?

A Yes.

Q To determine the existence of the presence of any type of heroin hydrochloride?

A Yes.

Q Was that a result that was found?

A Yes.

Q What was the result that was found?

A Traces of cocaine.

Q Does that also indicate that there were no traces of heroin hydrochloride found?

A Yes.

Q So too on the next page, glassine envelopes were submitted, am I correct?

A Yes.

Q Were there any traces found as to the glassine envelopes?

A There was no controlled substance detected.

Q Does that mean that there was no traces of heroin?

A Yes.

Q Let's go to May 3, 1977. You have Rosie Smith in custody, she has been arrested. What time did you pick her up?

A Approximately 8 a.m., approximately 8 a.m.

Q You took her where?

A I brought her to the Drug Enforcement Administration office on West 57th Street.

Q En route there, did you advise her under Miranda?

A Yes.

Q She make any statements?

A No.

Q Did you question her? Yes or no.

A I advised her what she was -- yes.

Q You advised her of what she --

A I advised her of her rights and the charge for which she was being arrested and if she wished to make any comments.

Q During the year 1974.

MR. LEVINE: Thank you.

A Practically every day.

Q How often would you see Marion Knuckles?

A Practically every day.

Q Where would you see him?

A In the Roma Garden.

Q During that time, what did you observe about the conduct or the activity of Marion Knuckles?

MR.ROSENBERG: Objected to, your Honor. We are talking about 1974. The alleged crime was 1976.

MR. LEVINE: That's correct, your Honor.

MR. ROSENBERG: May we have an offer of proof at side bar, Judge?

THE COURT: Come up.

(At the side bar.)

THE COURT: The concern I suppose relates not only to similarity in time but reasonable proximity in time to the acts alleged in the indictment.

MR. LEVINE: Your Honor, the government's offer of proof with respect to this witness is contained in essentially in its memorandum of law which was served a couple of days ago on all counsel. The witness Warren Sims will testify about essentially prior relationships he saw something going on he is no different than a teller in a bank.

THE COURT: I will permit the testimony. I think that even 1974 is not that remote in time given the similarity of the acts.

I will permit the evidence.

MR. WASHOR: Judge, before you go --

MR. LEVINE: One more point. I am sure it is clear to Mr. Rosenberg, since he averted to it, that the operation that was being conducted during '74 and '75 was an operation of which Frank Lucas was a part, and was the titular head.

This witness has been specifically directed not to mention Mr. Lucas' name in terms of his larger organization. His testimony will be confined exlusively to his dealings with the defendant Knuckles and the defendant Brown, and any reference to Mr. Lucas will be by first name only and he has been instructed not to mention the last name. And so any reference would be inadvertent.

He has also been instructed not to make reference at all to the fact that during the end of 1975, Mr. Knuckles was on trial in the Southern District of New York, and in connection with that instruction by the Assistant, by me, your Honor, the government has submitted a memorandum of law being sold on the street; yes or no?

MR. ROSENBERG: I am going to object to that as suggestive and leading. I think that the witness should be able to testify.

THE COURT: Yes. I don't know if we need that much leading to develop the testimony, Mr. Levine. See if you can rephrase that.

MR. ROSENBERG: Thank you, your Honor.

Q Did there come a time, Mr. Sims, in the spring of 1975, when you had a conversation with Mr. Knuckles about a package of heroin?

A Yes.

Q What was that conversation?

A There came a time when Glenn told me that the package that we were selling was not moving fast enough and that he was considering taking a package from Gwen.

Q Would you please describe for the Court and jury what you mean by a "package"?

A We were selling a package of -- we were selling narcotics for a person named Frank.

Q Please, Mr. Sims.

What did that package contain?

A A package contained anywhere from 1,000 to 3,000 quarters.

not offered against your client, as I understand?

MR. WASHOR: I understand that quite well.

THE COURT: Are you offering just 9-A?

MR. LEVINE: Yes, and the government will Xerox that page, your Honor. That is the only page that will be available. That is the only page being offered in evidence.

THE COURT: I am going to receive 9-A.

xx (Government's Exhibit 9-A received in evidence.)

MR. LEVINE: Your Honor, as the government stated, we will Xerox that page.

BY MR. LEVINE:

Q Mr. Sims, directing your attention to the portion of that page marked by a paperclip, the right side in the middle, could you please explain the notations that are contained in the box?

A Yes.

Q What are they?

A It has a figure here that shows $8,120 and a figure under that that shows $500, and behind the figure $500 it has a "PD" for Paid "R."

What does "R" stand for?

A Paid Raymond.

A This is the recording of another conversation between myself and Yolanda Valdez.

Q Do you recall the dateof that conversation?

A I do not.

Q Where was that conversation made from?

A The same office. The office of the Special Narcotics Prosecutor.

Q Showing you what has been marked Government Exhibit 13 for Identification, cna you identify that?

A It is another of the same recording between myself and Yolanda Valdez.

Q Did you consent to that recording?

A I consented to this recording also.

Q Where was that recording made?

A In the Special Narcotics Prosecutor's office.

MR. LEVINE: Your Honor, the government inadvertently placed the exhibit tag for 11 on the tape for No. 12 and vice versa. In order for clarity later on, I would like to switch them now and if the Court requests that we have them identified again, I will.

MR. ROSENBERG: He has identified those tapes as specific tapes taken on a certain day, and now that there is this discrepancy, I think that we should have a side bar so we may examine those exhibits and see for identification.

Your Honor, if the Court desires before the government offers them, the government can have the witness listen to the beginning of each one of them to refresh his recollection as to when they took place.

THE COURT: In the absence of objections, I have no desires.

MR. LEVINE: The government offers 10, 11, 12 and 13.

MR. ROSENBERG: May we see them, your Honor?

(Pause.)

MR. ROSENBERG: Your Honor, may the record indicate that we did have a lengthy side bar in reference to thewe tapes, your Honor, and you ruled that they would be dismissible and in view of that I make no objection at this time.

THE COURT: Very well.

Q I am showing you what has been marked Government Exhibit 10B for Identification. Can you identify it by number?

THE COURT: I will received into evidence as now properly identified Government Exhibits 10, 11, 12 and 13.

xxx (Government's Exhibits 10, 11, 12 and 13 previously marked for identification received by the Court.)

Q Showing you what has been marked Government Exhibit 10 received in evidence and Government Exhibit 10B, can you identify Government Exhibit 10B?

A I can identify the tape in my hand as a conversation between myself and Marion Knuckles.

Q Can you identify Government Exhibit 10B?

A I don't know by this number what this tape contains.

MR. LEVINE: Your Honor, can we go to the side bar?

THE COURT: Yes, all right.

(Side bar.)

MR. LEVINE: Your Honor, we're back to the situation that we had with Agent Brophy yesterday. Government Exhibit 10B has previously been identifed as a copy, in part, of Government Exhibit 10. 10B is the redacted copy and that's what that side bar conference was about yesterday.

This witness very properly does not see anything on 10B other than the number. It is the same number as Government Exhibit 10. There was a point in time when this witness did listen to 10B. He obviously cannot identify it now, since he has nothing to identify it from.

The government is going to offer 10B because the Court has already ruled that is the exhibit that is going to be played for the jury.

The government either suggests that we take a recess and have the witness listen to the recording so that he can identify it, or if counsel will waive their objection and have the Court receive 10B in evidence at this time.

THE COURT: It seems to me if you put this witness; testimony together with what Mr. Brophy said yesterday, and I have just found in my trial notes that a proper foundation is laid now for the admission of 10B, because Mr. Brophy did testify yesterday that the tape which is marked 10B for identification is a part, the readacted part of the tape which is marked Exhibit 10.

The trouble with 10B yesterday and the same trouble was shared by the transcripts is that they were children or progeny of the basic tapes themselves which a proper foundation had not been laid for, but I suggest to you gentlemen that 10B, when you put Mr. Sims' evidence together with what Mr. Brophy said yesterday, that 10B could now be admitted.

MR. ROSENBERG: Your Honor, am I correct in that your Honor has heard the full tape of 10?

THE COURT: Yes.

MR. ROSENBERG: And you have agreed with the government as to the redaction?

THE COURT: I have done so.

MR. ROSENBERG: And that 10B is what is left after the redaction?

THE COURT: That is what Mr. Brophy has identified it as being.

MR. LEVINE: And I represent to this Court that that is what 10B is.

MR. ROSENBERG: I will accept that representation and I think with a proper -- of course Mr. Grisorio and Mr. Washor, I think with a proper instruction to the jury that it should suffice.

MR. LEVINE: I don't know of any instruction.

MR. ROSENBERG: Except that the reason why 10B is being introduced and not the other is because there is certain evidence that has no materiality or basis in this case and it has been redacted by the Court.

You have to explain it some way.

THE COURT: That seems appropriate. Yes, I agree, all right.

MR. LEVINE: Your Honor, it is now five after 12:00. The government hopes that these tapes can all be played within the next half hour so that perhaps it can start cross-examination before lunchtime.

THE COURT: Mr. Washor has to disappear in the direction of New Jersey and you just give me a signal when you have to do that.

MR. WASHOR: Not at their direction, at your acquiescence.

MR. LEVINE: Thank you, your Honor.

THE COURT: But you just let me know when you have to do that.

MR. WASHOR: May I suggest something? I have made further inquiry earlier this morning. I am 95 per cent sure that they will have the prisoner there by 1:00 o'clock waiting for me to get there by 1:30. So that if this Court were to consider taking a break at the termination of the playing of the tapes which will probably be about a quarter of 1:00, it will also give co-counsel an opportunit to look at 3500 material over the lunch hour.

THE COURT: Let's try and do that.

(Continued on next page.)

e 3B a.m

(In open court.)

THE COURT: The tape which is marked Exhibit 10B for identification is received in evidence.

(Government's Exhibit 10B was received in evidence.)

MR. ROSENBERG: Your Honor, are you going to instruct the jury?

THE COURT: Yes, I thought a moment later, perhaps. I will do it. I have it in mind.

MR. ROSENBERG: Thank you.

MR. LEVINE: Just bear with me one moment, your Honor.

Your Honor, with the Court's permission now, the government would like to play the recorded conversations for the jury.

THE COURT: All right.

Now, ladies and gentlemen, you are going to hear the tapes that have been admitted into evidence. I want to give you a particular instruction with respect to the first tape. What you are going to hear is the tape which has been marked Government's Exhibit 10B in evidence. Now that is a copy but only a partial copy of the full tape which was marked Exhibit 10. I have listened to the full tape and you are only going to hear a part of the full tape, because the parts that you are not going to hear, I have ruled as a matter of law do not bear in any way upon the issues before us in this case.

It is important that you know that the first tape you hear is not a complete tape, and it is important that you know why and that is why.

In that regard, I might say that one of the sections of tape which I have direct you not to hear, because it is simply not relevant, relates to another individual bringing the defendant, Mr. Knuckles, to the telephone. You will hear on this tape a conversation between Mr. Sims, the witness, and the defendant, Mr. Knuckles.

I think it fair for you to know that that particular conversation between Mr. Sims and Mr. Knuckles was preceded by a brief conversation between Mr. Sims and another individual who then had to go and bring Mr. Knuckles to the telephone, but that has nothing to do with the issues before us and is consequently one of the sections which with my approval and my direction wound up on the cutting room floor, so to speak. So, that explains it.

MR. ROSENBERG: Your Honor, may I respectfully ask that you instruct the jury that it is Mr. Sims who is testifying that it is Mr. Knuckles. It is not conceded for the record.

MR. LEVINE: Objection, your Honor.

I think Mr.Rosenberg's speeches are out of place.

MR. ROSENBERG: I think it is proper, Judge.

THE COURT: Mr. Sims will testify as he testifies and the jury will listen to his testimony. It is fair to note, perhaps, that Mr. Knuckles concedes nothing.

Mr. Sims will testify and you will hear his testimony.

MR. ROSENBERG: Thank you, your Honor.

MR. LEVINE: With the Court's permission, your Honor, the government would like to instruct the jury on the use of the audio equipment.

THE COURT: Very well. You might instruct me too, while you're at it.

MR.LEVINE: Ladies and gentlemen of the jury, Court, defense counsel, defendants, there are head sets that are on each of your chairs. They have all been turned on at an earlier time this morning. If there are squeaks or siren-sounding noises eminating from them, you can press inside the ear phone on the blue portion of the head set and hopefully if you do it enough times it will stop any squeaks or squeals coming from the sets.

On each of the ear phones on the outside is a knob. Each one of the head sets is in the "on" position and if you haven't touched them since you picked each of them up, it is adjusted to normal hearing. That was done early this morning. But you can adjust it as you see fit.

Should any of you have any problems during the course of the playing of these tapes, just raise your hand and we can stop the machine and take care of any audio problems. At least this morning, each one of the head sets were working.

Your Honor, at this time though, I think the Court has Government's Exhibit 10A, 11A, 12A and 13A, which have been offered, which were offered in evidence yesterday, which the government offers in evidence again today.

THE COURT: I am going to receive 10A, 11A, 12A and 13A on the basis of Mr. Brophy's testimony.

MR. LEVINE: Your Honor, with the Court's permissio the government would like to pass out transcripts, Government's Exhibits 10A through 13A to the jury.

THE COURT: Very well.

(Government's Exhibits 10A, 11A, 12A and 13A were received in evidence.)

MR. LEVINE: Your Honor, pursuant to the Court's instructions, 10A starts with the middle of the page with the line "Knuckles: Hello."

(Tape played.)

statements in the furtherance of the conspiracy so that they are admissible under Rule 801(d)(2) as statements by a co-conspirator of a party during the course and in furtherance of the conspiracy.

We really must consider what the ends and purpose of the conspiracy were. Surely it cannot be said that those ends are limited to the distribution of narcotics from the conspirators' point of view; the primary objective is of course the receiving of illicit gain.

What these conversations deal with is in essence, the distribution of the proceeds. One of the alleged co-conspirators having expressed dissatisfaction with her share of the proceeds. The defendants urge upon me that that is an entirely separate transaction bearing no resemblance to the conspiracy or at least no relationship to the conspiracy within the context of Rule 801. It appears to be the defendants' contention that the objective of illicit gain is accomplished when the money is received into the coffers of the conspiracy as an entity, and that questions relating to the distribution of the proceeds as between the various co-conspirators may not fairly be regarded as being in furtherance of the conspiracy.

The government relies upon United States vs. James in the District of Columbia Circuit; however, upon

19 is granted as charged.

MR. WASHOR: Your Honor, insofar as 19 is concerned, I would request the fourth line from the top of page 2, where the sentence begins, "For inferring that the material in question is narcotics," I think you ought to substitute the word heroin, because then we are talking about any kind of narcotic.

THE COURT: That has been attended to.

MR. WASHOR: Then I would request also, your Honor, that there be an addendum. I would suggest the following addendum:

The jury must also consider the colloquial language used by the participants as evidenced by the tapes, such as "smoke," "silver quarters," to determine the nature of the substance in question.

This jury must also consider the laboratory analysis of the implements in question and the uncontroverted fact that traces of cocaine were found upon the mixing implements.

The Court has a right, you do in fact comment on the facts of the case preceding the request of the government. They talk about the testing of samples, of powder, deviousness, secrecy of transactions, code words. I think the Court has a right to protect the accused from the standpoint of the evidence.

What I have suggested is not subject to interpretation. They are facts within the purview of the case. To permit one side and not the other side seems somewhat unfair.

THE COURT: The government suggests certain circumstances pointing in a particular direction as far as the nature of this substance is concerned, Mr. Levine.

MR. LEVINE: Your Honor, I think that there is a substantial question of law here, whether what seems to be a defense of these defendants, namely that what was involved here was cocaine and not heroin constitutes a legal defense. The government intends to research that question, that legal question, tonight, and will brief it for the Court for tomorrow morning.

It is the government's position that even if counsel are correct that the substances were cocaine, that at most, it would be a variance between the indictment and proof, and it would be a legal question for this Court to determine whether or not it was a material variance that prejudiced the defendants, and that is a legal question, your Honor.

I have a feeling that the question of whether or not one can be convicted under 841 of possessing with intent to distribute narcotics, drug controlled substances, when the proof at trial is cocaine and the charge was heroin is not a material variance.

If that is the law, your Honor, which the government will determine, will try to find for the Court tonight, then the charge that Mr. Washor is expecting and the defense that is going to be offered in the summation should not be charged to the jury as a legal defense.

MR. WASHOR: I am going to request that we do not proceed with summation at this point. I think that would be very unfair. To proceed to summation this afternoon, then have the Court take a position contrary to our discussions now after final argument has been presented, your Honor, and changing the entire theory --

MR. ROSENBERG: Your Honor, I think the difference between cocaine and heroin, the preparation, the look of it, how it is packaged, how it is handled, how it is treated, the mixing ingredients and all, are so contrary and repugnant, one to the other, that the government could seriously take this position.

If the government took a position of cocaine, maybe experts could have been brought in. It is completely misleading and certainly surprising for the government at this point to say, well, it could have been cocaine and not heroin, when certainly throughout everything, every report, every test that was made was made for heroin.

MR. LEVINE: Of course the government claims that it was heroin, your Honor.

What is suggested here is an argument on the facts that are going to be made by defense counsel and it is no surprise to them, should not be any surprise. They haven't asked for an advance ruling by the Court. There is no charge that has been submitted by any of the defense counsel that if they find that cocaine was involved, then they should acquit.

There has been no charge, your Honor. The government is merely submitting to the Court that in the event the argument is made that there is a question whether the Court ought to charge that there is a legal defense, the government is not going to request that they charge that it is not a defense, but there is a question as to whether the Court ought to charge in this request number 19 the facts that Mr. Washor is suggesting. That's all.

THE COURT: But if there is a question, Mr. Levine, about that, and if the government wants to make a further submission to me about that, isn't it right that perhaps that question should be determined by the Court, the legal sufficiency of the defense, even if established on the facts, before counsel make their arguments?

MR. LEVINE: They can still make them, your Honor.

MR. WASHOR: Judge, I don't want to advance an argument where I am going to be put in a position that the Court will be telling the jury that it was a very nice try by Mr. Washor, but he is dead wrong.

I don't want you to charge me out of a summation.

I am in a position, I think, that is the reason for the rules of going through the requests to charge and having a decision by the Court prior to final argument. So that an advocate doesn't find himself in a position where he is now disagreeing with the Court.

THE COURT: It really seems to me there is some force to that. It has been apparent throughout the course of the trial that the defendants have been putting themselves into a position of being able to argue to the jury that the government loses because the evidence, to the extent that it show anything, indicates cocaine and not heroin.

Having paved the foundation for that argument, if defense counsel then makes the argument with all the passion and eloquence at their command and then the very last thing before the deliberations start the Judge sits up there and says, "Hey, it doesn't make any difference, you know, as a matter of law, whether it was cocaine or heroin," that is not a particularly happy position for the defendants to find themselves in.

At the very least it seems to me, if the defendants hblt 9

had known in advance that that was going to be the Court's ruling on the law, the might very well have fashioned their closing arguments somewhat differently.

MR. WASHOR: And cross examination.

THE COURT: Well, that is over the dam.

MR. WASHOR: But that is precisely the point.

You see, Judge, you are considering making and giving and you said you are going to give a multiple conspiracy charge. What you are telling the jury in a multiple conspiracy charge without delineating with any type of specificity to the words of cocaine or heroin, you are telling this jury, "Now, look, this defendant or these defendants are charged with the following crimes."

The government may well have proved that they committed 10,000 other crimes during the very same time period, but you the jury must only make a determination as to whether they are guilty of the crimes charged.

So, you are telling them about the legal defenses that are available. I intend to argue that if there was a conspiracy involving cocaine, the Court will tell you that that is not what defendant Smith is charged with. She is charged with the conspiracy to violate the narcotics law, and look at the indictment, specifically, to wit, violate the statute involving heroin hydrochloride.

MR. LEVINE: Your Honor, if the Court is going to rule like that, perhaps we ought to go downstairs and the government could start to do its legal research and submit something to the Court.

MR. ROSENBERG: Your Honor, Mr. Levine is asking your Honor to say, to change either/or heroin or cocaine.

MR. LEVINE: Oh, no, your Honor.

MR. ROSENBERG: Is he substituting cocaine now for heroin?

MR. LEVINE: Absolutely not.

MR. ROSENBERG: Well, what is it? It has to be one or the other. He is asking your Honor to say that the grand jury considered cocaine, because we are including now cocaine in the indictment.

With all due respect, and an apology to the Court, is the Court putting something into the indictment that was never ever before the grand jury?

The only thing that I saw before the grand jury in all the minutes I have seen, was heroin, a conspiracy for heroin. Now the government is asking the Court to change the indictment, something that was never considered by the grand jury, to include cocaine.

THE COURT: The indictment, Count 1, we will come to Count 2 in a moment, as to whether or not Count 2 could survive such a variance, but the conspiracy count talks about conspiracy to distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances.

MR. WASHOR: Then they define the substances.

THE COURT: One of the overt acts refers to heroin.

MR. WASHOR: This may give rise to a Costello-type motion now wherein we would have to ask the Court to review the proceedings before the grand jury so that the Court can determine what the charges are.

If there is poor draftsmanship in the nomenclature of the indictment just discovered now at this juncture in the trial, then it may be incumbent upon your Honor to pursuant to a Costello-type motion, inspect the grand jury minutes.

THE COURT: What is your suggestion, Mr. Levine?

MR. LEVINE: Your Honor, the government submits that Count 1 of the indictment is perfectly proper, that even if the defendants did cocaine instead of heroin, that it is a variance between Count 2 and the proof at trial but not a material variance to prejudice the defendants.

Mr. Rosenberg went on about all the different ways in which cocaine is mixed rather than heroin. There is no evidence of that, your Honor.

MR. ROSENBERG: I didn't say there was.

hblt 12

MR. LEVINE: And the government is going to argue to the jury that what was involved here was heroin. All the government is submitting to the Court is that the argument that is going to be made on the facts by the defendants is not necessarily a defense at law. There are many arguments that are made by defendants in summation as to why they should acquit the defendants. Not all the arguments are always a legal defense, and the government is merely requesting the Court that before it charges the jury as the defendants like, that the government be given an opportunity to demonstrate to the Court that that is not a material variance so that they do not get the benefit of a legal defense of a charge that establishes that argument as a legal defense. Not necessarily have to take it away as an argument on the facts.

MR. WASHOR: We have a bill of particulars here, I believe, don't we?

MR. LEVINE: And as far as the Costello-type motion that Mr. Washor is arguing now, both the Court and the government here have been through that river on a previous case, and I think the law is clear that an indictment may not be attacked on the ground of incompetent or insuffícent evidence and Costello specifically held that neither the Fifth Amendment nor the supervisory power of the Court ought to be utilized to dismiss and indictment on the grounds of insufficient or incompetent evidence, so I don't think that that is really a problem here.

THE COURT: Let me ask you all this:

Suppose the case goes to the jury just on the basis of the government's requests or comparable to it. And the jury then comes back with a verdict of guilty. In order to really come to grips with the legal consequences of a variance, how are Court and counsel going to know what the jury concluded the substance was? I have no immediate answer to this problem, I am just throwing it up for consideration. Because in the Court of Appeals, the defendants could succeed on a variance theory, it seems to me, only if they assume that the jury found the substance was cocaine and not heroin and convicted them anyway.

But how are we going to know that?

MR. ROSENBERG: Your Honor raises an interesting question. Let me go one step further.

What if the jury comes back and asks if they may consider it cocaine and not heroin? Then your Honor has to answer that.

THE COURT: You are hypothesizing a jury listening to the charge, starting to deliberate, then sending a question saying, "Well, what if we find it was cocaine but not heroin; may we convict anyway?"

MR. ROSENBERG: They may do that, because the only proof of a narcotic drug is a residue of cocaine.

MR. WASHOR: There is more positive proof than that.

MR. ROSENBERG: As to the cocaine?

MR. WASHOR: That's correct.

MR. LEVINE: There is also proof of heroin.

THE COURT: Yes, there is. There is circumstantial evidence from which heroin --

MR. LEVINE: And direct evidence out of the mouth of Yolanda Valdez Simpson, your Honor.

MR. WASHOR: I believe the Court in each and every instance when she testified took the position that she could not use the word heroin, but just "white powder" or "substance." So if the record in any manner or form has her using the word "heroin," that ought to be straightened out so it is not read improperly.

MR. ROSENBERG: I recall very correctly as to each and every witness, your Honor did not permit the use of the word "heroin."

MR. LEVINE: Your Honor, the government will stand by its recollection of the facts and argue to the jury its recollection of the facts.

MR. WASHOR: This is a specific instruction by this Court. This is not a question of recollection. This is not a question of testing one's memory. This Court took pains to make a statement and interrupt witness after witness and prohibit them from making the conclusory statement that whatever they were dealing with is heroin. I did not read the transcript seeking out if there was any error or mistake made to the point where the word "heroin" is in there where it should not be there. Clearly it was your Honor's intention not to allow a witness who had not had a proper foundation established with prior questioning to reach the conclusion that they were dealing with heroin.

You restricted each witness at that moment in time to use the words "white powder." Mr. Levine on occasion with his question incorporated in his question to the witness the word "heroin." But that does not obviate what this Court's intention was and I do not believe that it would be fair comment in light of that instruction if there is some error in the transcript whether Yolanda Simpson said, "Yes, I was dealing with heroin," and defense counsel, by inadvertence, by accident, because they did not hear, for whatever reason, did not raise their hands and say, "Judge, I remind you again what you just said, it can't be the word 'heroin,' 'white substance.'

That was your intention; to change at this point would be unfair.

THE COURT: Let's focus on the question of -- this question of variance. There may be something to be said for my deciding this issue before counsel sum up and before I charge the jury. If it is quite clear that it is not a -- it would not be a fatal variance, query as to whether or not the jury should not be told that in the charge.

On the other hand, if it is equally clear that it would be a fatal variance, then should not the jury be told that in connection with the charge? Do any of you gentlemen for the defense have any cases to show to me indicating that it would be a variance?

MR. WASHOR: I am going to be totally candid. I have done some work on this matter. I am under the impression that in the substantive count, it is a definite variance but it is not so as to the conspiracy.

You see, Judge, I can't play a game and bait people into what could be error. That is my understanding of the law. I believe that the second count of the indictment will survive, but I do believe the conspiracy count -- I am put in a very precarious position. I am an officer of the court, I have to argue points of law to the best of my ability, I do not want to hurt the accused, but in conscience, I prefer to go into this case not seeking reversible error if there is any.

I believe that the law is quite clear. I believe that the variance between the definition of cocaine and heroin as to the substantive count is sufficient not to permit the matter to stand but not so as to the conspiracy. Because the underlying aspect of the conspiracy is the illegal agreement, the particular definition of the narcotic does not carry the same strength as does the substantive charge. Because in the substantive charge, for example, you would be caused to give the importation aspect. If we are going to be totally candid, let the government acquiesce to the dismissal of the second count and go ahead with the conspiracy. That's all we have in this case anyway, but a conspiracy charge.

MR. LEVINE: Your Honor, the government doesn't concede to dismiss a count without doing its legal research. If it requiers that summations not be given until tomorrow morning, the government has no objection to it. It is the government's position that it does not constitute a material variance.

The 841(a)(1) relates to narcotic drug controlled substances and contains some five schedules under that. The penalties are the same, your Honor. It just does not seem that the particular drug controlled substance that is ultimately proved constitutes a material variance. There just doesn't seem, your Honor, as there is any prejudice to the defendants.

The penalty is the same.

THE COURT: And you make that point as to both counts of the indictment?

MR. LEVINE: I do, your Honor, but I really would prefer to do some legal research to see if there is a case in point.

MR. WASHOR: I say the variance is fatal to the substantive charge.

MR. ROSENBERG: Your Honor, Mr. Levine is basically saying to your Honor that if they prove everything else that is not in the complaint, then at the end they can move to have the proof conform to the complaint as in a civil case.

I think the government is bound here. Somewhere down the line they are bound, Judge. The whole position is heroin and they should be bound by that.

All their proof, their overt acts and everything else, all their indications, all their inferences, is heroin.

MR. LEVINE: Your Honor, we have a jury waiting. Perhaps we --

THE COURT: I am inclined to think that this should be researched further and we should plan on summations tomorrow morning after we have all done some research on it, including me, and I am in a position to rule on this, because I think there is a great deal to be said from the point of view of counsel's summations, from the point of view of the Judge's charge and from the point of view of the jury's deliberations to have me resolve this question. Because, if I do resolve it, if I tell you how I have resolved it and if I then instruct the jury in accordance with my resolution, whatever it may be, then in the Court of Appeals, you are all going to know where you stand.

And I think it is a much clearer basis and I don't know how I am going to come out on this, but I think that we should all perhaps do the sort of research that Mr. Levine has suggested.

MR. WASHOR: Judge, if I am correct, the heroin statute requires a different statutory presumption of importation, if I am correct. I don't believe that is necessary in a cocaine situation.

MR. LEVINE: Your Honor, under -- there is a head note, your Honor, under Section 21 USC Section 841(a)(1) which is the substantive crime to United States vs. Ramirez, a Second Circuit case, 482 F. 2nd 807.

I think, your Honor, the issue may be resolved if we could just get that case. The head note reads that that indictment charged violations relating to both Schedule I and Schedule II drugs whereas proof pertained only to cocaine.

A Schedule II drug did not establish variance or failure of proof.

MR. WASHOR: That is the conspiracy charge.

MR. LEVINE: Under a head note for 841, which is the substantive count.

THE COURT: We have considerable further comments to make on the requests to charge and I am not at all sure it being 3 o'clock, that we are going to accomplish summations this afternoon.

MR. WASHOR: The second count charge is Schedule I.

MR. LEVINE: But that case may have language that shows that may not be a material variance.

The case may nevertheless be a case on point that resolves the issue, Mr. Washor. But as the Court points out, itis going to be put over until tomorrow morning.

MR. WASHOR: We haven't finished the requests to charge.

MR. ROSENBERG: I was going to suggest that we try to finish the requests while we are here.

THE COURT: I think that we have another hour on this. And I think the thing to do is to send the jury home and to bring them back. We will be ready for them first thing in the morning We had better be. But I think it is proper that we address these issues and there are some other issues that arise later on in some of the other requests. So, let's go down and send them home and tell them to come back tomorrow morning and then we will come back up here.

MR. ROSENBERG: May we leave our belongings?

THE COURT: By all means.

(In open court - jury present.)

THE COURT: Ladies and gentlemen, I told you before lunch that counsel and the Court would have to meet and discuss requests to charge the jury which are essentially legal questions.

We have been doing that. As you know from your own observations in this case, counsel for all parties are able and thorough and articulate, and we have been having an interesting discussion about some interesting questions. And they are important questions which simply have to be resolved, at least to me, satisfaction before counsel can address you and I can give you my charge. And we are not finished with that project, and I don't think there is any sense in keeping you longer this afternoon because if we did so, then we wouldn't be in a position to start closing arguments until quite late in the afternoon and you are going to have the benefit of five separate closing statements,because under our procedure, counsel for the government will sum up first and then each of the three defendants can sum up, and then the government can, if it an opinion giving citations.

My conclusion is that the gist of the crime charged is the possession with intent to distribute of a controlled substance, a narcotic.

I perceive in the law no significant variance between a charge of possession with intent to distribute a narcotic substance which the government identifies in the indictment as heroin and proof, if the jury so finds, of possession with intent to distribute a narcotic substance which is cocaine. Consequently, I perceive no variance and certainly no variance resulting in prejudice to the defendants either with respect to the charge and proof in Count 1 or with respect to the charge and possible proof in Count 2,and what I'm going to instruct the jury is that if they find beyond a reasonable doubt each of the essential elements in Counts 1 and 2, as I will describe them to them in detail, then they may convict the defendants in this case even if they conclude that the actual substance involved was cocaine and not heroin, and I think that you gentlemen should keep that in mind when you tailor your closing arguments.

I think it was quite right for the question to be raised and the Court's opinion elicited before you made your summations, but that is the Court's holding wclt 2

THE COURT: Very well.

MR. LEVINE: Ladies and gentlemen of the jury, your Honor, good morning:

It is now that time of the case when all of the evidence is in, and the government puts together all of that evidence for you to show you how it fits together, as was told to you in the opening, and to show you how it fits what the indictment charges these defendants in violation of the federal narcotics laws.

You were told at the outset that this case was a capsule view of a heroin factory operation. The case has taken a little over a week, and even though it is basically a very simple case, I want to take a couple of minutes now to review those facts with you, review what you heard here about this particular heroin operation, putting the pieces side by side, to show you how, in the government's view, it all fits together.

What is charged here, ladies and gentlemen, is a conspiracy, and this conspiracy wasn't created overnight. It didn't drop out of thin air.

How did these three defendants -- defendant Marion Knuckles, who has been referred to as Glenn; the defendant Rose Smith; and the defendant Raymond Brown -- how did they get into the courtroom here together? It was no mistake, ladies and gentlemen. Because who does the defendant Marion Knuckles turn to when he leaves his seafood operation down in South Carolina to come up to his illegal heroin operation here in Manhattan? Does he go to the Yellow Pages and take the first one out whose name is "A" and the first one out whose name is "B" and the first one out whose name is "C" and invite them to an apartment someplace in Manhattan to work all night with white powder? No, ladies and gentlemen.

First, he turned to the defendant Raymond Brown. He brings along his companion, his righthand man.

You heard testimony from not one, but two people -- Warren Sims and Betty McFarland--who told you about the prior relationship between the defendant Marion Knuckles and the defendant Raymond Brown. 1973, 1974, 1975. All in the heroin business.

And who does Raymond Brown turn to? Raymond Brown, ladies and gentlemen, turns to his wife in the street, his companion, the defendant Rose Smith. And where does the defendant Knuckles turn to for his source of heroin? He turns to the individual that you have heard here referred to as Gwen, who lives in the vicinity of 96th Street and Fifth Avenue. And is that unusual? Did he find this in the Yellow Pages under the shopping guide for heroin? Of course not, your Honor, ladies and gentlemen.

October 14th, Warren Sims asks Yolanda Valdez Simpson, "What was the quantity of that stuff that you brought back in the pink shopping bag?"

Yolanda Valdez Simpson tells you, at page 4 of Government's Exhibit 12A, "Like the first, uh, let me see, I say it would look like, maybe, two ounces of smoke."

You heard the defendants on cross examination ask witness Warren Sims, "What's smoke?" and he says, "Marijuana."

And on redirect examination I asked Warren Sims, "About how big is an ounce of smoke?"

And Warren Sims testified, if you recall, "Oh, well, it's about, packaged, oh, 5 inches wide, perhaps, and maybe an inch, an inch and a half thick."

And Yolanda Valdez Simpson testifies that it looked like 2 ounces of smoke. And so that would make it about 3, 4 inches wide -- thick.

The government submits to you, just like the witness Yolanda Valdez Simpson told you, it is about the width of the bottom of this package and about 5 or 6 inches high.

And so that white powder in the pink shopping bag is in the apartment at 626 Riverside Drive. And she is waiting. And about 9 o'clock the defendant Knuckles arrives. And now all the workers in the heroin factory start to punch in the clock, start to come to work for their eight-hour shift, not right here in Manhattan. And there all the shareholders met that night to mix and bag heroin.

The government submits to you there is the agreement right there.

Defendant Rose Smith sticking her fingers in the bag and lining them up, handing them to the defendant Knuckles, who is spooning them in with that spoon that looks like that pink spoon, and handing it to the defendant Brown who rolls them up and tapes them on the outside, ahd handing them too to Yolanda Valdez Simpson.

That is the agreement, ladies and gentlemen. There is more agreement than that. They meet outside Fifth Avenue at 95th Street or 96th Street and put the bags and the boxes in her car.

The defendant Knuckles and the defendant Brown, Yolanda Valdez Simpson. The government submits to you, just picture those four people, these three defendants, standing around that table working all night, agreeing to mix and bag heroin for the streets.

Count 2 charges what we lawyers call the substantive count.

I said, I think twice already, it is the distribution or possession with intent to distribute those 2,000 quarter bags. And the goverment submits to you that the proof on the substantive charge is all the proof that the government has explained to you on the conspiracy count.

Of course, ladies and gentlemen, actual heroin is not here. It is in the arms of the addicts on the street. Of course, the government would like to have the heroin here, ladies and gentlemen --

MR. ROSENBERG: Your Honor, objection.

THE COURT: I think the jury should disregard what counsel said about its ultimate destination. There is no evidence on that.

MR. LEVINE: But you will recall the testimony, ladies and gentlemen. Yolanda Valdez Simpson told you that Warren Sims had taught her how to mix heroin, and that the whit powder that was in the pink shopping bag that they were working with that night looked like the same kind of stuff, because it was one color of white, and cocaine was some other color of white.

But that is not all to show what they were really doing here, ladies and gentlemen. Did they get $45 a bag for cane sugar? For popcorn? Do they work all night in an apartment and move the next time to another apartment and to another apartment?

If they are working on a chemical process for sugar to go to the A&P do they use quinine and bonita to make

T3

Other kinds of evidence has come in here and the government will just briefly show you that the testimony here is truthful. You have heard Warren Sims and Betty McFarland tell you about the prior relationships that they had with the defendant Brown and the defendant Knuckles and all the quarters that were sold in 1973 and 1974 and 1975, for the first two of those years at a time when Yolanda Valdez Simpson didn't even know the defendant Knuckles. The same plan, the government submits to you. The defendant Knuckles is on the top and thedefendant Raymond Brown is his righthand man. The government submits that the Court will charge you that you can consider that on the issue of intent, on the issue of common plan, a common design and whether they did it the same way is circumstantial evidence. The Judge will charge you that you can consider that as you consider the indictment here.

What else? Well, you heard Warren Sims and Betty McFarland testify that they worked with the defendant Knuckles in 1973 and 1974 and 1975, and you heard Agent Brophy tell you that when the defendant Knuckles was arrested and after he was advised of all of his constitutional rights, his right to remain silent, and advised that anything he said could be used against him in a court of law, and advised that he had a right to get an attorney before he continued and if he couldn't afford one the Court would appoint one for him -- after he gave all the background material of his life, working in South Carolina where he was living and up in New York, he said words to the effect, "I haven't done any heroin in the last two years and I don't intend to," and that statement, ladies and gentlemen, confirms what Warren Sims and Betty McFarland told you. It is overwhelming, the government submits to you, and what does a good lawyer do when he is faced with an overwhelming situation like that? He tries to get from underneath the statement, that is exactly what the defendant Knuckles did here, ladies and gentlemen.

As you recall, on cross-examination Agent Brophy, after several pushing questions, said, "It is possible that we said, 'Have you done any narcotics lately?'"

He said it wasn't likely that they gave him a time frame. The government submits to you that that is all a good lawyer can try to do when he is confronted with a statement by the client that suggests that more than two years ago he did deal in heroin, particularly when there is testimony here from witnesses that more

than two years ago they did deal in heroin with this derendant.

That is not all, ladies and gentlemen. Just with respect to the defendant Rose Smith the government submits that you also have her statement here which shows that at least with the defendant Rose Smith Yolanda Valdez Simpson is also telling the truth. You heard the testimony of Agent Brophy that after the defendant Rose Smith was arrested and after she was advised of all of those rights that you have all heard about from Miranda, she was advised of those uptown and then again downtown in the offices of the Assistant U.S. Attorney, and then after she was asked about doing narcotics lately and after she was told, as her lawyer brought out, about 626 Riverside Drive on the way down -- of course she was advised, ladies and gentlemen, of why she was being arrested, what it was for -- she said to the Assistant United States Attorney, "Iwent to the table with other persons and Yogi at the 626 Riverside Drive apartment. We worked all night. We mixed over a couple of thousand quarters. I don't know how many more. I helped other persons do other packages at the apartment at 319 West 116th Street. All the packages were heroin. One of the people didn't pay me for working

Now, ladies and gentlemen, the Judge is going to charge you on the law, and the defendants, not being able to touch Yolanda Valdez Simpson's story, and you haven't heard any comments here in summation about how what happened in the apartment that night in early October couldn't have happened. No, ladies and gentlemen, because the government does not hav an agent who bought off one of these 2,000 quarters, so that it could be sent to a laboratory for analysis, the defendants now claim that the government cannot prove its case.

Well, ladies and gentlemen, the Judge is going to charge you on the law, and the Judge will tell you that this statute does not require that the government put on a chemist to prove that the substance that was involved is heroin.

Ladies and gentlemen, you use your common sense.

Well, the defendants suggest maybe it could have been cocaine or LSD. It could have been a lot of things, ladies and gentlemen. The government submits to you it was heroin.

The Court will charge you on the law that if it were a narcotic controlled substance, that is sufficient.

But let's go to this big argument about cocaine, that this was all a cocaine case and not a heroin case. There is a lot of yelling and screaming about that, ladies and gentlemen. Let's pick out the proof, the proof, the testimony

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen, I am about to perform my principal function and charge you on the law in this case. We are coming close to the end of this partnership that I said to you and the other members of the panel, when you were first selected, that jurors and judges enter into under our system, and that is that we each have our independent but related functions to perform. I am about to perform mine, and then you will perform yours.

You jurors are the sole judges of the facts, but you must find those facts in accordance with the instructions on the law that I give you. This is the essence of the partnership under our law, and it has played a part of the legal system of this country since the Republic was founded some 201 years ago. It has come to us directly from the system of English law to which we owe and from where we have inherited many of our procedures.

Different systems pertain on the continent of Europe and in other countries and in other parts of the world. But for many hundreds of years it has been the tradition under the Anglo-American system of law that in any case where the liberty or the property of a citizen is in jeopardy in a court proceding, he or she has the absolute right to have the issues of fact determined by a jury of fellow citizens.

But those citizen jurors, in finding the facts, must abide by and follow the instructions of the Court on the law. Again, it is the essence of the partnership. And I suggest to you that that partnership is intended to preserve all of us from one of two possible tyrannies,the first one being a possible tyranny of judges. Because if it were possible for judges to not only declare the law but, whenever they wished, to find the facts as well, then the risk that arises would be one of judges too close to the Crown or to some other form of government, or too far removed from the common sense comings and goings of the populace, or too remote in an ivory tower, or too bound by pride of position or some other hardening of the arteries of the soul and the heart, to really perform the system of justice as it should be performed.

And so, in cases of this nature, citizen jurors find the facts. But if it were possible for jurors to not only find the facts but disregard rules of law or make up rules of law as they go along, then we would run the risk of that other tyranny, namely, a tyranny of the people themselves, for stability and order in society depend upon rules of law which are declared by courts and are binding upon the citizens.

If we each do our job correctly, if I charge you correctly on the law, and if you accept those instructions on the law as you were bound by your oaths to do, and if you then find the facts on the evidence fairly and impartially and without bias or sympathy, then we each will have done our parts in this traditional and important partnership, and the ends of criminal justice will have been served in this case.

I would like to charge you on the law in the informal sort of manner in which I have been speaking to you most recently, but it is a somewhat complicated matter and I want to be sure to get it right, and I certainly cannot remember it all, and so from time to time, indeed for most of the time, I am going to be reading my charge to you. It may seem impersonal, but it is important that I get it right or do the best I can.

Before doing so, though, I do want to thank you, all of you, for your participation in this case. It has been suggested by older and more experienced judges, some of them, that thanks to jurors are not appropriate because you are performing a duty of citizenship and we should not be thanked for doing our duty. And yet I perceive a difference in the performance of one's duty. There is a difference, for example, between coming to court sessions on time, as you have done, and being chronically tardy. There is a difference between paying careful attention to the evidence and to counsel, as you have done, and being inattentive. There is a difference, in other words, between caring and not caring, and this is a choice which we all make one way or another every day of our lives.

I am satisfied that you have worked hard in this case under adverse circumstances, and I do not hesitate to thank you for it.

I come now to the charge on the law.

You will soon undertake your final function as jurors, and here you do indeed perform one of the most sacred obligations of citizenship, acting as ministers of justice. You are to discharge this final duty in an attitude of complete fairness and impartiality, as was emphasized by me when you were selected as jurors and again just a moment ago, without bias or prejudice for or against the government or any defendant, as parties to this controversy.

This case is important to the defendants who are charged with serious crimes. It is equally important to the government, for the enforcement of criminal law is a matter of prime concern to the community and to its welfare.

Let me add this:

The fact that the government is a party entitles it to no greater consideration than that accorded to any other party in litigation. By the same token, the government is entitled to no less consideration. All parties -- government, corporations and individuals alike -- stand as equals before the bar of justice.

Your final role is to decide and pass upon the fact issues in the case. You are the sole and exclusive judges of the facts. You determine the weight of the evidence you appraise the credibility of the witnesses, you draw the reasonable inferences from the evidence, and you resolve such conflicts as there may be in the evidence.

I shall later refer to how you determine the credibility of witnesses.

In aid of your recollection, you may at any time during your deliberations request the testimony to be read back to you or ask to examine certain exhibits.

Furthermore, at the conclusion of these instructions I shall give you each a copy of the indictment for your convenient reference during your deliberations.

My function, as I have said, is to instruct you as to the law, and it is your duty to accept these instructions as to the law and to apply them to the facts as you may find them.

With respect to any fact matters, your recollection and yours alone governs. As I have already told you, anything that counsel either for the government or for the defense may have said with respect to matters in evidence, whether during the trial, in a question, in argument or in summation, is not to be substituted for your own recollection of the evidence. So, too, anything the Court may have said during the trial or may refer to during the course of these instructions as to any fact matter in evidence is not to be taken in place of your own recollection.

During the progress of the trial, on a number of occasions the Court may have admonished counsel on one side or the other. Such incidents are to play no part in your fact determination. The rights of the parties are governed by the evidence and the law and not by the personalities of the lawyers or that of the Judge.

During the trial I have sustained certain objections to evidence and overruled other objections. There have been conferences outside of your hearing on these matters, quite a few of them in fact. Place them all out of your mind. They dealt with questions of law. Attorneys are duty bound to make objections if they see fit. It is my duty to rule upon them. These activities have nothing to do with your determination of the facts.

The fact that I may have asked questions of witnesses from time to time does not indicate any feelings of mine about the facts one way or the other. I have no such feelings. My questions were intended only to clarify the issue at hand.

What, then, does the evidence which you are to consider in your determination of the facts consist of? It is the testimony of witnesses who have appeared before you, together with the documents which have been received as exhibits by the Court and certain stipulations of counsel.

A further word on the nature of evidence:

The law recognizes two types of evidence, direct and circumstantial.

Direct evidence is where a person testifies to what he himself saw or heard, that which he has knowledge of by virtue of his senses.

Circumstantial evidence consists of proof of facts and circumstances from which in terms of common experience one may reasonably infer the ultimate fact sought to be established. Such evidence, if believed, is of no less value than direct evidence, for in either case the essential elements of the crime charged must be established by the government beyond a reasonable doubt.

Let me give you a homespun example of circumstantial evidence.

Suppose that some day when you came into the courtroom on this trial, the sun had been shining brightly outside, but the shades were drawn and you could not see what was happening to the weather outside. And after we had been going for about an hour or so, the door of the courtroom opened and in came a gentleman wearing a dripping raincoat and carrying a dripping umbrella. Well, you cannot see directly what has happened to the weather outside, but from the appearance of the dripping raincoat and umbrella, you can logically and reasonably draw an inference from those observations that you can make to an additional fact, namely, what the weather is like outside.

Or for another example:

Robinson Crusoe coming to his tropic island, not certain whether there was anyone else on the island or not, but when he comes closer to the beach he sees a series of footsteps walking around the island. Well, that is circumstantial evidence from which he can reasonably infer the possible presence of someone else on the island. These are examples which are offered to you simply to illustrate the point.

The government in this case relies upon both the direct and circumstantial evidence to sustain its burden of proof.

Now, how are you to appraise or to weigh the evidence which has been presented? I mentioned at the very start of the trial, before you heard any evidence, that it was important for you not only to listen but to look and observe the witnesses as they testified. Perhaps you now understand why I suggested this. Your determination of the credibility of a witness very largely depends upon the impression which he or she made upon you as to whether or not he or she was giving an accurate version of what occurred.

It is frequently said to jurors that when you walk into the courtroom and sit in the jury box while the trial is going on or while you are deliberating in the jury room, you have your common sense, your good judgment and your experience with you.

The degree of credit to be given a witness should be determined by the witness' demeanor, by his or her relationship to the controversy and the parties, his or her bias or impartiality, the reasonableness of his or her statements, the strength or weakness of recollection viewed in the light of all other testimony, and the attendant circumstances in the case.

The question is, how did the witness impress you? Did his or her version appear straightforward and candid or did he or she try to hide some of the facts? Is there a motive of any kind to testify falsely? In other words, what you try to do, to use the vernacular, is to size a person up, just as you would do in any important matter where you are undertaking to determine whether or not the person was truthful, candid and straightforward.

In passing upon the credibility of a witness, you may also take into account inconsistencies or contradictions as to matters in his or her own testimony or any admissions of false testimony or of false statements on prior occasions.

I am not saying that there were instances of any of these in the trial before you. I am simply giving you illustrations of the sort of criteria to which you can look in applying your common sense and judge the credibility of witnesses.

There are specific instructions which I will give you a little later on with respect to certain of the witnesses who have appeared before you. But you must keep in mind that the ultimate question for you to decide in passing upon credibility is:

Did the witness from the witness stand tell the truth before you in this courtroom? It is for you to say whether his or her testimony at this trial is truthful in whole or in part in the light of his demeanor, his or her explanations, and all the evidence in the case. The fact that a witness is a government employee does not require that his or her testimony be given any greater weight or consideration than that accorded to any other witness.

In appraising the credibility of all witnesses, you take into account the interest of the witness, if any, motives and other factors which may reasonably be considered to influence or color one's testimony.

If you find that any witness has wilfully testified falsely to any material fact, you may reject all of the testimony of that witness, or you may accept such part or portion as commends itself to your belief as credible, or which you may find was corroborated by other independent evidence in the case.

You are not to be swayed by the number of witnesses which one particular side produces. It is the quality and not the quantity of the evidence which is important.

The defendants have not testified in this case. That is their absolute right, and in no respect may such failure to testify be considered by you as any evidence against them or any of them or as a basis for any presumption or inference unfavorable to them or any of them.

You must not permit such fact to weigh against them or any of them, nor should it enter in any way whatsoever into your deliberations or discussions.

Before we consider the precise charges against the defendants on trial before you, some additional preliminary matters should be noted.

Count 1, the conspiracy count of the indictment, charges that the defendants conspired with each other or with one or more of certain other persons named therein to violate the federal drug control laws.

Count 2, the substantive count, as we have called it, charges the defendants actually committed the crime referred to in that count, the alleged distribution and possession with intent to distribute of certain narcotic substances.

The indictment uses the word "count." Counsel have used that word in their arguments. I use it in my words to you today. It is a technical lawyer's word. The word "count" in a criminal indictment means charge or accusation. A count in an indictment is in effect an accusation that the defendant has violated the law in a particular way.

If an indictment contains more than one accusation, then it contains more than one count.

In the present indictment the defendants are all charged in the two counts in the indictment.

On this trial you will be concerned only with the guilt or innocence of the defendants before you--Mr. Knuckles, Mr. Brown and Ms. Smith. The fact that other persons named in the indictment are not on trial with these defendants is not to enter into your deliberations in any way, nor may you draw any inference for or against the defendants or against the government or anyone else by reason of that fact.

You are aware from her testimony that Yolanda Valdez Simpson, also known as Yogi, has pleaded guilty to the conspiracy count, to the first count of the indictment. That was her personal plea and hers alone, and that fact may not be considered against the defendants here on trial, nor may any adverse inference be drawn against them by reason of the plea of Ms. Simpson. Guilt is personal.

The guilt or innocence of each of the defendants here on trial must be determined solely upon the evidence presented against them individually or the lack of evidence. The charges against them and each of them stand or fall upon the proof or lack of proof as to them, and not as to any co-defendant or anyone else. That is a most important principle of our criminal law. I shall return to it later in these instructions.

There are certain principles of law which apply to every criminal case and to which I made reference and emphasized at the time of your selection as jurors. I repeat them now.

The indictment is merely an accusation, a charge. It is not evidence or proof of a defendant's guilt. No weight whatsoever is to be given to the fact that an indictment has been returned against these defendants. They and each of them have pleaded not guilty. Thus, the government has the burden of proving the charges against them and each of them beyon[illegible]asonable doubt.

T[illegible]endants do not have to prove their innocence. On the contrary, they are presumed to be innocent of the accusations contained in the indictment. This presumption of innocence was in their favor at the start of the trial, it continued in their favor throughout the entire trial, it is in their favor even as I instruct you now, and it remains in their favor during the course of your deliberations in the jury room. It is removed only if and when you are satisfied that the government has sustained its burden of proving the guilt of a particular defendant beyond a reasonable doubt.

The question that naturally arises is:

What is a reasonable doubt?

The words almost define themselves. It is a doubt founded in reason and arising out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence.

Reasonable doubt is a doubt which appeals to your reason, your judgment, your common sense and your experience.

It is not caprice, whim, speculation, conjecture or suspicion. It is not an excuse to avoid performance of an unpleasant duty. It is not sympathy for a defendant.

If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say you are not satisfied of the guilt of a particular defendant, that you do not have an abiding conviction of a defendant's guilt— in sum, if you have such a doubt as would cause you as prudent persons to hesitate before acting in matters of importance to yourselves -- then you have a reasonable doubt, and in that circumstance it is your duty to acquit the defendant under consideration.

On the other hand, if after such a fair and impartial consideration of all of the evidence you can candidly and honestly say you do have an abiding conviction of a defendant's guilt, such a conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt, and in that circumstance it is your duty to convict the defendant under consideration.

One final word on this subject:

Reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few persons, however guilty they might be, would be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty.

In consequence, the law in a criminal case is that it is sufficient if the guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt.

I turn now to the law that is the subject of the indictment and the difference between the two counts in the indictment.

The counts in the indictment charge violation of the Drug Abuse Prevention and Control Act. This law was enacted by Congress in an effort to combat the illegal importation, distribution, possession and improper use of various drugs which have a substantial and detrimental effect upon the health and general welfare of the American people.

Under that Act, various drugs are classified as controlled substances and are listed in schedules. These schedules include narcotic drugs as well as other drugs.

Heroin, which is a narcotic drug, is included in Schedule I as a controlled substance.

The first count of the indictment charges Mr. Knuckles, Mr. Brown and Ms. Smith, together with others named individuals, as being engaged in a conspiracy to violate the drug control law. I shall refer to the first count of the indictment as the conspiracy count.

The second count, to which I shall refer as the substantive count, charges the defendants with the commission of an actual violation of the law which makes it unlawful for one to distribute or possess with intent to distribute a controlled drug.

A conspiracy to commit a crime is an entirely separate and different offense from the substantive crime, which is the objective of the conspiracy. The essence of the crime of conspiracy is an agreement or understanding to violate other laws. The conspiracy, which is sometimes referred to as a partnership in crime because it involves collective or organized action, presents a greater potential threat to the public interest than the illicit activity of a single individual.

Group association or organized activity renders detection more difficult than in the instance of a single or lone wrongdoer. Thus, because of the special dangers to the community of conspiracies to distribute controlled drugs, Congress enacted as part of a drug control law a provision that a conspiracy to violate the Act constitutes a separate crime in addition to the substantive offense.

Count 1 of this indictment is based upon a section of the law which provides in pertinent part:

"Any person who conspires to commit any offense in violation of the Drug Control Act is guilty of a crime."

In the present case, the defendants are accused of conspiring to violate the Drug Control Act.

The actual violation of the Act, which is charged in Count 2 of the indictment, the substantive crime, is based upon another part of the Act which in pertinent part reads:

"It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

That charge appears in Count 2 of the indictment. It relates to the alleged distribution or possession with intent to distribute of approximately 2,000 quarter bags of heroin in New York on or about October 1, 1976.

Against this background of the applicable law, I am going to turn to a consideration of the specific counts of the indictment. Since the essential elements which the government must prove in order to sustain the specific charges are given for each count, we shall consider each count, Counts 1 and 2, the conspiracy and the substantive count, separately.

Thus, as to the first or conspiracy count the grand jury charges as follows:

"From on or about the 1st day of August, 1976 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Marion Knuckles, a/k/a 'Glenn,' Jane Doe, a/k/a 'Gwen'"-- who is not before you -- "Raymond Brown, Rose Smith and Yolanda Valdez Simpson, a/k/a 'Yogi,'" -- who is not before you as a defendant -- "the defendants, and others to the grand jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate" -- certain sections of the Federal Control Laws. Those sections are set forth in the indictment itself.

Quoting again from the indictment:

"It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the grand jury unknown, in violation of" -- certain sections of the law, which are set out in the indictment.

I say to you again that the fact that the charges appear in the indictment and that I have read the indictment to you in the course of these instructions does not in any way consitute evidence of guilt.

In order to convict any of these three defendants on trial, the government must prove beyond a reasonable doubt the following essential elements with respect to conspiracy:

1. The existence of the conspiracy charged in the indictment, that is, an agreement or understanding to violate those provisions of law which prohibit the distribution or possession with intent to distribute narcotic substances.

2. That the defendant under consideration knowingly associated himself or herself and participated in that particular conspiracy.

3. That at least one of the conspirators knowingly committed at least one overt act in furtherance of the conspiracy within the Southern District of New York.

I will come to the concept of an overt act a little later on, but within the context of this particular case I charge you that the Borough of Manhattan falls within the Southern District of New York.

Now let us consider the first element necessary to constitute a conspiracy.

The idea of a conspiracy is simple. A conspiracy is a combination, an agreement, an understanding, of two or more persons to accomplish by concerted action a criminal or unlawful purpose, in this instance to distribute or possess with intent to distribute a controlled substance, namely, a narcotic drug.

The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law. The success or failure of the conspiracy is immaterial to the question of the guilt or innocence of a conspirator.

To establish a conspiracy, the government is not required to show that two or more persons sat around the table and entered into a solemn pact orally or in writing stating that they had formed a conspiracy to violate the law or the details or the means by which its object was to be achieved.

Common sense tells you that when persons in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. It is rare that a conspiracy can be proved by direct evidence. What the evidence must show in order to establish that a conspiracy existed is that two or more persons in some way or manner, through any contrivance, impliedly or tacitly, came to a common understanding to violate the law or to accomplish an unlawful plan.

Now, the period of time charged in the indictment runs from on or about August 1, 1976, to May 5, 1977. It is not necessary for the government to prove that the conspiracy started and ended on those specific dates. A conspiracy continues for as long as the evidence shows the conspirators intended to continue it.

It is sufficient if you find that in fact a conspiracy was formed and that it existed for some substantial time within the period set forth in the indictment and at least one overt act was committed during that period.

In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged co-conspirators which were done to carry out an apparent criminal purpose. The adage "Actions speak louder than words" may be applicable here.

Usually the only evidence available is that of disconnected acts and conduct on the part of the alleged individual co-conspirators, which acts and conduct, however, when taken together in connection with each other and considered as a whole, permit an inference that a conspiracy existed as conclusively as by direct proof.

You must first determine whether or not the proof establishes the existence of the conspiracy as charged in the indictment. In deciding this first element, you must consider all the evidence which has been admitted with respect to the conduct, acts and declarations of each alleged co-conspirator and such inferences as may reasonably be drawn therefrom.

It is sufficient to establish the existence of the conspiracy if, from the proof of all the relevant facts and circumstances, you find beyond a reasonable doubt, as I have defined that phrase to you, that the minds of at least two alleged co-conspirators met in an understanding way to accomplish, by the means alleged, one or more objects of the conspiracy as charged in the indictment.

If you do conclude that the charged conspiracy did exist, you must then next determine the second element, namely, whether the defendants on trial or any of them was a member of the conspiracy. Their participation in the conspiracy, if you have first found that a conspiracy existed, must be established by the independent evidence of their own acts, statements and conduct, as well as those of the other alleged co-conspirators and the reasonable inferences to be drawn therefrom.

To find any one of these defendants in this case guilty of conspiracy, you must find beyond a reasonable doubt that, aware of the existence of the conspiracy and its purposes, he or she was a willing participant with the intent to advance its purposes.

To become a member of a conspiracy, a particular defendant need not know all the other members, their respective roles in or all the details of the conspiracy. Each member may perform separate and distinct acts at different times. Some conspirators may play major roles while others may play minor roles.

In short, it is not required that a person be a member of the conspiracy from its very start. A single act may be enough to draw one within the ambit of the conspiracy, provided the proof establishes that, aware of the conspiracy, he or she knowingly associated himself with it and participated therefrom.

However, mere knowledge or acquiescence in the object or the purpose of the conspiracy is not sufficient. More is required. This something more is generally described as a stake in the venture or a stake in its outcome. While a financial stake in the venture is not essential, if you do find that a particular defendant had such an interest, this is a factor that may be considered by you in deciding whether or not a defendant was a member of the conspiracy, if, again, you have first found that a conspiracy existed.

One may join an existing conspiracy at any point during its progress, and, however limited his or her role, if he or she in fact joined it and participated, then he or she is responsible for all that had been done even before he or she joined and that may be done thereafter in furtherance of its objectives.

A conspiracy has sometimes been described as a partnership in criminal purposes. Simply stated, by becoming a partner, an individual assumes all the previous liabilities of the partnership. Once you are satisfied beyond a reasonable doubt that a conspiracy existed and that the defendants on trial or any one of them became a member, then the acts and declarations of any other person found to be a member, made during the pendency of the conspiracy and in furtherance of its objectives, are considered the acts and declarations of the defendant.

Thus, if you find a conspiracy as charged existed, of which the witness Ms. Simpson was a member, then the distribution of heroin or possession of heroin with intent to distribute, or any sale of heroin made by Ms. Simpson or any discussion of any act to further or arrange such a distribution or sale, would be binding upon Mr. Knuckles, Mr. Brown or Ms. Smith, the defendants on trial, if you further find that they or any of them were in fact members of the conspiracy which you have also found in fact to exist.

And this would be so even if such acts were committed when the defendants on trial were not actually present.

Summing it up in a simple way, if in fact there was a partnership in crime, each partner acts and speaks for the others, in the furtherance of the partnership business, whether or not the other was present.

The existence of the conspiracy and one's membership therein may be established by direct evidence or by circumstantial evidence. Conspiracies are rarely susceptible of proof by direct evidence. Usually they are established as a matter of reasonable inference based upon circumstantial evidence.

As I charged you earlier, direct evidence is where a person testifies to what he saw or heard and observed and what he knows of his own knowledge.

Circumstantial evidence, as I have also said, is where facts are established from which, in terms of common experience, one may logically infer other facts that are sought to be established. And I endeavored to give you two examples of circumstantial evidence.

I charge you that circumstantial evidence, if believed, is of no less value than direct evidence, for as I have also said, in either case, whether circumstantial or direct evidence is being offered, you must be convinced beyond a reasonable doubt as to the guilt of any particular defendant.

Whether a particular defendant knowingly and intentionally participated in the claimed conspiracy presents issues of fact. Clearly these are issues which concern what goes on in an individual's mind. Medical science has not yet devised an instrument whereby we can go back to the time of the occurrence of events and determine what was then a person's intent or knowledge. These issues must of necessity be determined from one's acts, his conduct, surrounding circumstances, and such inferences as may reasonably be drawn therefrom.

I wish to add one word of caution. Mere association of a defendant with an alleged conspirator or conspirators does not establish his participation in a conspiracy, assuming you should find a conspiracy did in fact exist.

So, too, mere knowledge by a particular defendant of a conspiracy or any illegal act on the part of other alleged co-conspirators is not sufficient to establish a particular defendant's membership.

Before the inference may be drawn that a defendant was a member of a conspiracy, you must, as I have already instructed you, be satisfied from the evidence presented by the government that this particular defendant knowingly associated himself with the conspiracy with the specific intent to add the accomplishment of its unlawful purposes.

It is important to remember that in deciding this question of association and participation, you must look only at words and deeds of a defendant whom you were considering in deciding whether that individual has been shown by the evidence to have been a member of the conspiracy.

The actions of others do not determine whether a particular individual is a participant. The words and deeds of each particular defendant that you are considering and the legitimate inferences therefrom alone will determine whether he is a member of the conspiracy.

Proof of a particular individual's participation must be substantial and not slight. Thus, in considering whether a particular defendant was a member of the conspiracy, you must do so independently of the acts of the other alleged co-conspirators. In other words, whether the defendants or any one of them was in fact a member of the conspiracy or joined the conspiracy must be determined on the evidence which you accept as to his or her own actions, conduct, statements and declarations, if any, his or her own connection with the acts in aiding all the other alleged conspirators, and not other independent acts and statements of anyone else.

You are the sole judges of the evidence on these points.

I have already mentioned the third essential element of the crime of conspiracy is that an overt act intended to effect the object of the conspiracy be committed by at least one of the co-conspirators after the unlawful agreement has been made.

An overt act is a legal phrase that lawyers use, but it has a well-recognized meaning.

An overt act is any step, action or conduct which is taken to achieve, accomplish or further the objective of the conspiracy. The purpose of requiring proof of an overt act is that, while parties may conspire and agree to violate the law, yet they may change their minds and do nothing to carry it into effect, in which event it will not constitute an offense.

An overt act need be neither a criminal act nor the very crime which is the object of a conspiracy.

Now, in this case the overt acts listed in the indictment are as follows:

"1. On or about August 16, 1976, Marion Knuckles, a/k/a 'Glenn,' the defendant, had a telephone conversation concerning the conditions in the street for selling heroin."

And I am reading from the indictment now.

"2. In or about October, 1976, Marion Knuckles, a/k/a 'Glenn,' Jane Doe, a/k/a 'Gwen', and Raymond Brown delivered a quantity of quinine and bonita to the defendant Yolanda Valdez Simpson in the vicinity of

1160 Fifth Avenue, New York, New York.

"3. In or about October, 1976, Marion Knuckles, a/k/a 'Glenn', and Jane Doe, a/k/a 'Gwen', the defendants,- delivered a quantity of heroin to Yolanda Valdez Simpson, the defendant, in the vicinity of 1160 Fifth Avenue, New York, New York.

"4. In or about October, 1976, Marion Knuckles, a/k/a 'Glenn', Raymond Brown, Rose Smith and Yolanda Valdez Simpson, diluted heroin with quinine and bonita and placed the diluted heroin in approximately 2,000 quarter bags of heroin hydrochloride in the vicinity of 626 Riverside Drive, New York, New York.

"5. In or about October, 1976, Marion Knuckles, a/k/a 'Glenn', gave Yolanda Valdez Simpson approximately $400.

"6. On or about October 12, 1976, Yolanda Valdez Simpson had a telephone conversation concerning an argument with the defendant Marion Knuckles, a/k/a 'Glenn', about the payment to her of additional money for preparation of the heroin for distribution in Overt Act Number 4."

Those are the overt acts set forth in the indictment, and you will observe that some of these overt acts refer to criminal conduct allegedly the object of the conspiracy.

However, other overt acts appear on the surface to be quite innocent. Thus, Mr. Knuckles, for example, is described as having engaged in a telephone conversation. Telephone conversations are not in and of themselves criminal conduct. But if, as the government charges, these phone calls were for the purpose of furthering a distribution of narcotics, then they shed their outward innocent appearance and become overt acts to further the purpose of an illegal enterprise.

It is not necessary for the government to prove that each member of the conspiracy committed or participated in a particular overt act, since the act of any one done in furtherance of the conspiracy becomes the act of all other members. That assumes, of course, that you have found in the first place that a conspiracy existed, and secondly, with respect to any particular defendant, that he or she was in fact a member of the conspiracy.

The government is not required to prove each of the overt acts alleged in the indictment, nor indeed is the government required to prove any of those precise overt acts referred to in the indictment. It is sufficient in law if the government proves the commission of at least one overt act, as I have defined that term, in furtherance of the conspiracy, at or about the time alleged and within the Southern District of New York--and, as I have charged you, the Borough o

Manhattan falls within the Southern District of New York.

As reflected in a prior charge I have given you, I would simply reiterate that with respect to the times alleged in the indictment with respect to the conspiracy, it is sufficient if you find that in fact the conspiracy was formed and existed within the period set forth in the indictment and that at least one overt act was committed in furtherance thereof within that period and within the Southern District of New York.

To sum up: Under the conspiracy count, in order to convict the defendants or any one of them, you must find beyond a reasonable doubt:

1. The existence of the conspiracy as charged;

2. A knowing participation in that conspiracy by the particular defendant you have under consideration; and

3. The commission of an overt act in the Southern District of New York by a co-conspirator in furtherance of the conspiracy.

Please remember that, as I have said previously, you are considering the defendants in this case, and the guilt of each defendant is a personal question; that is to say, with respect to the guilt of any defendant, the government must prove each of the three elements I have just referred to beyond a reasonable doubt.

I have already instructed you on the meaning of reasonable doubt. If each of the necessary elements has been so proved as to a particular defendant, then you must convict him or her of conspiracy.

On the other hand, if any one of the elements has not been so proved as to a particular defendant, then you must acquit that defendant of conspiracy.

Although the indictment charges a single conspiracy it would be possible on the evidence to find separate conspiracies, one relating to the distribution and possession of 2,000 quarter bags of narcotics which are processed in the 626 Riverside Drive apartment of Yolanda Valdez Simpson, and the other relating to 500 quarters of a substance which the government's witness, Betty McFarland, says defendant Mr. Knuckles gave to her for distribution and which she subsequently returned to defendant Brown to give back to Mr. Knuckles.

I have said it would be possible for you to find that these transactions comprised two separate conspiracies. It is also possible for you to find that they formed a part of the same conspiracy.

Whether or not there was one conspiracy or two conspiracies or no conspiracy at all is a fact for you to determine on all the evidence and in accordance with these instructions. Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment, unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, as I have said, if you are satisfied that such a conspiracy existed, you must determine who were the members of that particular conspiracy.

And if you find that a particular defendant is a member of another conspiracy not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty, you must find that he or she was a member of the conpsiracy charged in the indictment and not some other conspiracy.

It follows from what I have said that you will not consider any act or declaration against any defendant unless you find beyond a reasonable doubt that the person doing the act, making the declaration, was a member of the same conspiracy as was that defendant and that the conspiracy you have found was the conspiracy alleged in the indictment.

As I have also said, in determining whether any particular defendant was a party to the conspiracy alleged in the indictment, each is entitled to individual consideration of the proof respecting him or her, or the lack of such proof, in proving any evidence of his or her knowledge or lack of knowledge, his or her status, his or her participation in conversation and his or her participation in the plans, schemes or arrangement alleged in the indictment or the province of that plan.

That completes my charge on the conspiracy. I am about to turn to the substantive count of the indictment, but before I do that, why don't we all, including me, just sit back and relax and stretch for a moment.

(Pause.)

Turning now to the substantive count, which is Count 2 of the indictment, in that count the grand jury charges that:

'On or about the first day of October, 1976, in the Southern District of New York, Marion Knuckles, a/k/a 'Glenn,' Jane Doe, a/k/a 'Gwen', Raymond Brown, Rose Smith and Yolanda Valdez Simpson, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 2,000 quarter bags of heroin hydrochloride."

I have already read to you the law upon which this substantive violation is based, but let me read it to you again. The law provides in pertinent part:

"It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

In order to find the defendant or any of them guilty of this count, the government must establish beyond a reasonable doubt:

1. That on or about the date charged thereon they distributed, or possessed with intent to distribute, a narcotic controlled substance.

2. That they did so knowingly or intentionally. The second element means that the defendant knew what he or she was doing, but the distribution or possession with intent to distribute was deliberate and purposeful; that the acts or conduct were calculated and were not due to inadvertence or mistake.

3. That the substance involved was in fact a narcotic controlled substance.

I charge you as a matter of law that both heroin and cocaine are narcotic controlled drugs. That leads me to a particular instruction which I must give you.

There have been suggestions in this case that the particular substance which forms a part of the transactions and activities alleged in the indictment constituted cocaine and not heroin. I charge you that the statute under which this indictment is brought prohibits the distribution or possession with intent to distribute of certain controlled narcotic substances. And the conspiracy count in this indictment refers to the same underlying statute.

I charge you that both heroin and cocaine are controlled narcotic substances within the statute, and I charge you further that if you find that the government has proved beyond a reasonable doubt each of the elements necessary to constitute a conspiracy as I have just given it to you, you find that each of those elements has been established beyond a reasonable doubt, then if you further find that the substance was not heroin but was cocaine, that particular fact is of no legal significance, and that is because the statute prohibits the distribution or possession with intent to distribute of either substance. That is equally true, I charge you, with respect to the substantive count.

If you find that each of the necessary elements in the substantive count have been proved by the government beyond a reasonable doubt, as I have defined that term to you, then if you make the additional finding that the substance in question was not heroin but was cocaine, that is of no legal significance.

In saying that to you, I am not suggesting for a moment whether you should find that the elements have been established or whether you should find that the substance in question was heroin or cocaine or any other substance. Those fact questions are entirely for you to decide. I am simply instructing you as a matter of law that if the elements are established it would make no difference if you make the further finding that the substance was not heroin but was cocaine.

To return to the substantive count, the three elements are, again:

1. That on the date charged, defendants or either of them, any of them, distributed or possessed with intent to distribute a narcotic controlled substance;

2. That they did so knowingly or intentionally; and

3. That the substance involved was in fact a narcotic controlled substance.

A few words about what is meant by distributing or possessing with intent to distribute.

You will note that first element of the offense consists of either distribution or possession with intent to distribute a narcotic drug. The word "distribution" is used in its ordinary sense. It simply means to transfer, to pass on or to hand over to another.

The word "possess" means to have something within your control.

This does not necessarily mean that you must hold it physically. As long as an object is under your control, you possess it.

A further instruction on the word "possess."

Possession may be of two types: actual or constructive.

Actual possession means that a defendant knowingly has personal, manual or physical control of the narcotics.

Constructive possession exists where the narcotics are in the physical possession or being handled by another person, but the defendant, the person alleged to have constructive possession, has the power to exercise control over the narcotics or their distribution, their movement, or to set the price for their sale or to cause their delivery.

So, too, one who has a working relationship with another, who has physical custody of narcotics, so as to cause or effect their delivery to a prospective purchaser in consummation of the sale, may be said to have constructive possession of the narcotics.

In this connection, the word "intent" refers to a person's state of mind. So the term "possess with intent to distribute" means to control an item with the state of mind or purpose to transfer or pass that item or deliver it to another person. That purpose may involve a contemplated sale, but a sale is not required.

However, in this case the government contends that the possession with intent to distribute was to effect an ultimate sale.

The second element of the substantive offense requires that the government prove beyond a reasonable doubt that the defendants and each of them distributed or possessed with intent to distribute a narcotic controlled substance unlawfully, wilfully and knowingly.

Now, what do these particular words mean?

Knowingly and wilfully mean deliberately, they mean intentionally. In other words, knowingly and wilfully mean that a defendant distributed a narcotic substance or possessed it with knowledge that he was doing so, that he intended to distribute such a substance or possess it deliberately and in the free exercise of his will.

The words knowingly and wilfully are opposed to and contrast with the idea of inadvertence or mistake.

In order to prove this element, you may take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

As to the third element, the indictment charges and alleges that the narcotic drug controlled substance was heroin. And I have just instructed you as a matter of law that heroin is a narcotic drug controlled substance, and you must find beyond a reasonable doubt that the substance in issue was a narcotic controlled substance as charged. But in that regard I reiterate the charge just given, that what the law prohibits is the distribution or possession with intent to distribute of a controlled narcotic substance.

Heroin and cocaine are both such substances. It is not necessary that the nature of the substance be proved by direct evidence. There need be no sample placed before you, nor need there be testimony by qualified chemists, as long as the evidence furnishes grounds for concluding beyond a reasonable doubt that the material in question was in fact a narcotic controlled substance.

There are several categories of circumstantial evidence which you may consider in determining whether a given defendant possessed a narcotic drug as charged in the substantive count. I say you may consider such categories of circumstantial evidence. Whether or not you do so is entirely up to you as finders of the fact. Such possible categories of circumstantial evidence include testimony of someone who personally tested samples of the powder in question, or the secrecy or deviousness, if any, with which the transactions were handled or the fact that the substance in which they were dealing was a white powder substance or the high prices paid in cash for the substance. It is entirely up to you.

If upon all the evidence you are satisfied that the defendants or any one of them had possession of a quantity of narcotic, that the defendant knew that it was a narcotic controlled substance and further find that the government has established beyond a reasonable doubt the essentials and the essential elements of the crime as I have just g iven them to you, that will be sufficient to convict a particular defendant on the substantive count.

I am not going to outline in detail the evidence and all the contentions upon which the parties rely. Counsel have summed up extensively. To review in detail the testimony of each witness will be unnecessary.

The government, as I have said, must establish its burden on each and every element of the conspiracy and substantive counts as to each and every defendant. It relies upon the testimony of Yolanda Valdez Simpson and certain allegedly corroborative witnesses and tape recordings and other evidence, in order to establish the conspiracy under Count 1 and the substantive charge under Count 2.

In addition to the foregoing, the government relies upon circumstantial evidence to support its charges. The defendants challenge the government's case. They rely upon their presumption of innocence in their favor.

I have already charged you on that presumption and its effect. The defendants are under no obligation to put in any evidence whatsoever. They are under no obligation to pursue or initiate any particular line of inquiry on cross examination of the government witnesses. They are entitled, as I say, to rely upon their presumption of innocence.

They point to the contradictions in the evidence offered by the government witnesses and the absence of evidence of certain points which they urge to be significant. They attack the credibility of the principal witnesses against them. They contend that the government's case does not establish guilt beyond a reasonable doubt as to any of the charges.

The defendant Brown has called Mr. Gray, his employer in the cab business, as a witness on his behalf.

I have not, as I have said, adverted to all the evidence upon which the government and the defendants rely to support their respective contentions. All evidence, whether or not I have referred to it, is important and must be considered by you.

If by any chance I have made reference to any evidence which does not agree with your recollection, you are to disregard such references by me, and I emphasize the importance of this to you as strongly as I know. Always it is your recollection that governs.

You are called upon to decide the fact issues here which will require you to pass upon the credibility of witnesses. Previously, as you will recall, I instructed you generally on how to determine the credibility of witnesses and how to assess the significance of evidence. I shall now give you further instructions concerning types of witnesses and particular types of evidence which are present in this case.

Ms. Simpson has testified that she was a participant and an accomplice in the conspiracy charged in the indictment and in the substantive offense. She has pleaded guilty to the conspiracy charge against her, and as I have already noted, that plea on her part is personal, is binding only upon her, and cannot be considered against any of the other defendants.

As I have noted, she alleges that she was a participant. It is up to you to accept or reject that testimony.

If you accept it, she is characterized as an accomplice. In certain types of crime the government of necessity is compelled to rely upon the testimony of accomplices. Otherwise it would be difficult to detect and to prosecute some wrongdoers, and this is particularly true in conspiracy cases.

Often the government has no choice in the matter, it must take the witnesses and the transactions as they are.

There is no requirement in federal criminal law that the testimony of an accomplice be corroborated. It by no means follows that simply because she is an accomplice she is not capable of giving a truthful version of events.

A conviction may rest upon the uncorroborated evidence of such a witness if it is found credible by you as finders of the fact. However, the testimony of a witness who is an alleged accomplice or acknowledged accomplice should be viewed with great caution and scrutinized carefully.

The question, I repeat, in this case is:

Did Ms. Simpson tell the truth before you?

That is for you to judge.

hus, you are at liberty to consider what weight, if any, should be given to the defense argument that either this witness or other government witnesses may color their testimony in the hope that a judge may give them recognition for such cooperation.

In the case of Ms. Simpson's testimony and that of other government witnesses as well, the question that arises is whether such witness slanted her testimony in the hope that such a witness could secure more favorable treatment at the time of sentence. That question and all questions concerning credibility are for you and you alone to decide. If you find that the testimony of such a witness or any witness was deliberately untruthful, then you should unhesitatingly reject it.

On the other hand, if you are satisfied that such witnesses gave truthful versions of events, that upon the totality of the evidence the government has sustained its burden of proof as outlined in these instructions, then you have sufficient cause upon which to convict.

You have also heard the testimony of Agent Brophy. As I have said to you before, the fact that this agent is a law enforcement officer does not require that you give his testimony greater weight or credence than that accorded the testimony of any other witness. His credibility is to be judged by the same standards applied to other witnesses who testified, taking into account their manner, demeanor, and other factors which bear on credibility.

If you find, as I have said, that any witness has wilfully testified falsely to any material fact, you have a right to reject the testimony of that witness in total or you may accept only that part or portion which you believe or which you may find corroborated by other evidence.

There has been testimony that the defendant, Mr. Knuckles, made a statement at the time of his arrest. Conduct of the defendant, including statements knowingly made and facts knowingly done, upon being informed that a crime has been committed or upon being confronted with a criminal charge, may be considered by the jury in the light of all other evidence in the case in determining guilt or innocence.

When a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. Such evidence may of course be considered only against that particular defendant and not against any other defendant.

Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt and the significance to be attached to any such evidence are matters exclusively within the province of you as the jurors. And the jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

There has been testimony that defendant Rose Smith made a statement at the time of her arrest in which she admitted involvement in the diluting and packaging of heroin at 626 Riverside Drive. With respect to that statement by the defendant Smith, I have the following instructions:

If you find that the defendant Smith did make the statement and made it voluntarily and knowingly, then you may give the statement such weight as against her, and against her alone, as you believe it deserves, after considering all the circumstances which were brought out in the evidence.

You will recall hearing telephone conversations which Warren Sims recorded while talking with various persons, including the defendant Mr. Knuckles. As I explained to you when you were being chosen, the use of these devices in the manner described in this case is a proper investigative technique. That is so, essentially because Warren Sims, who was a participant in the conversations, consented to have them recorded.

In connection with these recorded conversations, the government has introduced transcripts purporting to accurately portray them. However, transcripts of the tapes in evidence that are before you are not evidence themselves. They are merely transcriptions of what appears on the tape recordings which you have heard. They are no better than the tapes upon which they are based. It is for you to decide whether the transcripts correctly present the data set forth in the tape recordings upon which they are based.

You are to determine the facts on the basis of all the evidence, direct evidence, evidence elicited on cross examination, the exhibits, and the stipulations.

For the government to prevail, it must, with respect to each count, prove the essential elements by the required degree of proof, as already explained in these instructions. If it succeeds on a particular count as to a particular defendant, your verdict should be guilty, and if it fails, it should be not guilty.

You must consider each count separately and render a separate verdict as to each defendant concerned in each count. The verdict in each instance must be unanimous. You may if you wish report your verdicts spearately from time to time as you reach them unanimously, if that will aid you in your deliberations, or you may wait until you have concluded all your deliberations. That is entirely up to you.

I just wish to make it plain that if in the course of your deliberations you have still not decided certain issues but you have reached a conclusion as to the guilt or innocence of a particular defendant on any particular count, it is entirely proper for you so to advise the marshal and the clerk and to come back and record that part of the verdict and then go back and resume your deliberations on such issues as you have not yet decided.

Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendants solely upon the evidence and these instructions. Under your oath as jurors, you cannot allow a consideration of the sentence which may be imposed upon a defendant if he or she is convicted to enter into your deliberations or to influence your verdict in any way. Your duty is to decide the case solely and only upon the evidence. In the event of conviction, the duty of imposing sentence rests solely upon the Court, and you are not to be concerned with it.

Each juror is entitled to his or her own opinion, but each should exchange views with his or her fellow jurors. That is the very purpose of jury deliberation:

To discuss and to consider the evidence, to listen to the arguments of fellow jurors, to present your individual views, to consult with one another, and to reach an agreement based solely and wholly upon the evidence, if you can do so without violence to your own individual judgment.

Each one must decide the case for himself or herself after consideration with his or her fellow jurors. But you should not hesitate to change an opinion which, after discussion with your fellow jurors, appears erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from others, you are not to yield your conviction simply because you are outnumbered or outweighed.

Your final vote must reflect your conscientious conviction as to how the issues should be decided. I repeat that you may ask to hear evidence read to you or you may have exhibits sent in to you.

Also, if you wish, I will repeat any part of this charge during your deliberations. Any such requests should take the form of a note from the foreman of the jury to me. Please make any such requests as specific as possible. Be very careful that any such note gives no indication whatever of the current state of your thinking on any count. Your verdict will be announced only at the end of the trial and in open court, and that verdict will take the form of separate findings of guilty or not guilty as to each defendant on Count 1 and guilty or not guilty as to each defendant on Count 2.

The juror who sits in the number one chair will act as the foreman of the jury,unless for any reason he decides not to serve in that capacity, in which case your first order of business will be to elect another foreman of the jury and send me a note on that subject.

These are my instructions on the law to you, ladies and gentlemen. However, before you commence your deliberations, I am now going to give counsel an opportunity to meet with me in the robing room and to make any additional requests or objections to the charge. I will ask you to simply relax in your places for a moment while I meet with counsel for that purpose.

I will see counsel and the court reporter in the robing room.

(In the robing room.)

THE COURT: Does the government have any requests or objections to the charge?

MR. LEVINE: No, your Honor.

THE COURT: I will hear from defense.

Mr. Rosenberg?

MR. ROSENBERG: Your Honor, I have no requests to charge, but I do object to your Honor giving the alternative of heroin or cocaine in your charge. I know that we have discussed it at great length, and certainly your Honor has given much time to it. And let me just reiterate, for all the reasons set forth in all that argument, I must strenuously object to that part of the charge.

THE COURT: Very well.

MR. GRISORIO: I have the same objection, your Honor, and in addition to that, I again request that charge number 6, as presented to your Honor, be read to the jury.

THE COURT: I decline that request, Mr. Grisorio.

MR. WASHOR: Your Honor, I suppose all of the conferences and exceptions and discussions taken in chambers relative to requests to charge would constitute appropriate exceptions for the appellate court, without enumerating each and every one at this point.

THE COURT: Without presuming to speak for the Court of Appeals, for my part I would have no question that what you have just said is so.

MR. WASHOR: May I specifically just indicate that as to the Court's charge relative to lack of differentiation between the substance heroin and cocaine, I believe the Court should instruct the jury that the government must establish beyond a reasonable doubt that the substantive question must be from either Schedule I or Schedule II. If they fail to do that, we do have a serious problem as to variance. It could be a third substance. It could be a fourth substance And if they fail to prove what it is to their satisfaction, we run the very serious chance of having someone accused or found guilty of a crime for which they are not charged.

THE COURT: The defendants are certainly entitled to a charge that the government must prove beyond a reasonable doubt that the particular substance that we are speaking of, or that has been referred to, is a controlled narcotic substance. But it is of course also true that the statute provides different penalties with respect to different substances.

I had intended to touch upon the necessity of establishing that particular element of the charge and did so in part. What is now being raised is whether it should be clarified or amplified or further focused in any way.

What is your reaction to that, Mr. Levine?

MR. LEVINE: Your Honor, I think the Court charged the jury that they must find beyond a reasonable doubt that a narcotic controlled substance was possessed with intent to distribute or distributed. I think that the Court charged essentially what Mr. Washor is asking. I don't know how the Court could charge what he is asking. If he wants an enumeration of all the narcotic controlled substances under I and II.

MR. WASHOR: No, no. Under III and IV.

MR. LEVINE: I don't know if there has been any reference -- I know Mr. Rosenberg made one reference to cocaine, which the government made one reference to in its rebuttal summation.

MR. ROSENBERG: Generally said, it could be many, many different --

MR. LEVINE: I don't think there is any evidence in the case, your Honor, about any narcotic controlled substances other than heroin or cocaine, and I think that the Court has covered both of those in its charge to the jury. If there is something more that Mr. Washor requests of the Court, I think the government ought to hear it before it responds.

MR. WASHOR: I am legally perturbed about the fact that a white powder could well be a substance in Schedule III or IV and not necessarily in Schedule I and Schedule II.

MR. ROSENBERG: I was under the impression that your Honor did limit it to heroin or cocaine.

MR. WASHOR: That is just the point.

MR. ROSENBERG: May I respectfully ask the Court if that was the intention of the Court?

THE COURT: Well, that is really what we are talking about. I'm not sure that I charged them in precisely those words.

MR. ROSENBERG: You limited it in Count 2, your Honor, if I may interrupt, but I don't think you made it very clear in Count 1.

THE COURT: The possible difficulty that arises, i seems to me, lies in this: that the sections of the statute that provide for penalties provide that, with respect to a narcotic substance in Schedule I or Schedule II, the penalties are the same.

MR. WASHOR: But as to III and IV --

MR. LEVINE: Your Honor, there is no evidence in the record of any narcotic controlled substances in III or IV. Mr. Washor's request has no basis in the record.

MR. WASHOR: Judge, he keeps saying there is no evidence in the record. We don't have to produce evidence in the record. They haven't proved that it is Schedule I and Schedule II other than by indirection. We have argued it could be cocaine, we have argued it could be something else. Let's not switch the burden just because we are making the request to charge.

It is a white powder. I suggest to you you can take judicial notice, if there is such a thing anymore, that the "pills," before they are manufactured and put into their capsule form for illegal distribution, at one time are in the form of white powder.

Now, there is no expert testimony as to how they are mixed, how they are brought about. Suppose it is a mescaline that is being prepared there, it is in a white powder form. They didn't bring the chemist. They didn't prove it. You have got a chemist on this jury.

THE COURT: Would the government oppose a further instruction to the effect that the government must establish beyond a reasonable doubt that the substance in question was either heroin or cocaine?

MR. LEVINE: Your Honor, the government feels that the state of the charge as presently constituted is sufficient. I think that it is even possible that the Court made reference to that kind of a charge in its original charge to the jury. I know the Court made reference to it in various ways, telling the jury that they had to find that there was a narcotic controlled substance beyond a reasonable doubt, and telling them also that there has been evidence that there is both cocaine and heroin.

So I think that what Mr. Washor is requesting has really been completed. And whether these defendants prevail in the Court of Appeals, if it gets to that, on the question of variance, which they have suggested to the Court here, I don't think is going to turn on the Court's further instructing the jury on what kind of a narcotic controlled substance they must find that the government proved beyond a reasonable doubt.

Mr. Washor's request really leaves everyone up in the air, your Honor.

THE COURT: I think, on reflection, that the charge with particular reference to the elements and the natur of the substance and the charge that the government must establish beyond a reasonable doubt that it was a controlled narcotic substance, and that heroin and cocaine are both narcotic controlled substances, is sufficient. I am going to let the charge stand on the basis previously given.

MR. WASHOR: Your Honor, one last exception, and that is failure of the Court to admonish, or give to the jury the question of voluntariness of defendant Smith's statement as a question of fact and the question of intelligent waiver by her at the time of the making of the statement. That is a question of fact.

MR. LEVINE: Your Honor, it is my understanding that the Court charged the jury on such matter. If Mr. Washor's understanding is that the Court did not, perhaps the Court could reiterate the charge to the jury. It certainly is an important charge that ought to be given.

THE COURT: My own firm recollection is that I did give such a charge.

MR. WASHOR: Judge, I just missed it. If you did, of course, I have to withdraw the exception.

THE COURT: It came well towards the end, but I am quite sure that the record will show that on that point I gave the following charge:

"There has been testimony that the defendant Smith made a statement at the time of her arrest in which she admitted involvement in the diluting and packaging of heroin at 626 Riverside Drive. With respect to that statement by the defendant Smith, I have the following instructions:

"If you find that the defendant Smith did make the statement and made it voluntarily and knowingly, then you may give the statement such weight as against her and her alone as you believe it deserves after considering all the circumstances which were brought out in the evidence."

That is the charge I gave.

MR. WASHOR: I withdraw the exception, your Honor.

MR. LEVINE: Your Honor, I think the Court has repeatedly admonished the jury during the course of the trial as to the particular weight to be given to the testimony of witnesses which precedes the conspiracy in the indictment.

I don't know that the Court's charge to the jury at this point in time considered reiterating that charge relating to prior similar acts, and perhaps at this time it might be possible to give the limiting instruction the Court gave on, I think, four or five earlier occasions relating to the testimony of Sims and McFarland and Yolanda Valdez Simpson.

THE COURT: It is true that that was not specifically reiterated in the charge I have just given. It was not specifically requested by the government or by anyone else in connection with this particular charge. I certainly don't mind giving it again. It was the law then and it is today. But do the defendants feel any concern as to whether a renewed reference on my part to the evidence of the prior acts, even though coupled with the appropriate limiting instruction, would tend to give the evidence of those prior acts a perhaps unwarranted prominence?

MR. WASHOR: I have a suggestion to make, if the Court will entertain the suggestion:

That your Honor admonish the jury, or rather, advise the jury, when we go back out there after this session, that all legal instructions, including and not limite to any limited instructions given to them during the trial as to how and in what manner they were to accept evidence and as to what use they were to make of such evidence, applies now as well as during the trial, and explain to them that you would rather not go into those details over and over again, having done so so many times during the course of the trial, again advising that if there is anything they want to hear about your charge or any legal instructions they have the right to come out.

This will eliminate pinpointing and directing the aspect of prior similar acts. If they are aware of what you are talking about, then they will also be aware of the efficacy with which they can handle the matter in line with your instructions.

THE COURT: I wonder if that isn't better.

MR. GRISORIO: I would prefer that, your Honor, rather than bring back the whole subject again.

THE COURT: It seems to me it is better. I am a little reluctant from the defendants' point of view to have the last thing that falls from my lips a specific reference to prior acts. I would prefer not to do that.

MR. ROSENBERG: Your Honor, I was going to suggest that I will make no request and I think it should be left alone. Co-counsel seriously considered that it be left alone. I think we covered it in summation. I think Mr. Levine covered it in summation. I think your Honor's limiting instructions during the whole trial was effective.

It is an intelligent jury, they have listened to it.

MR. WASHOR: My suggestion was only set forth if you were going to abide by the request of the government. If you are not, I will concur with co-counsel that it be left in its proper perspective.

THE COURT: I think I will leave it as is.

MR. LEVINE: Your Honor, can we be clear, at least at this point in time, then, that defendant Brown and the defendant Knuckles and the defendant Smith waive any objection they have to the Court's not charging the jury on those prior acts before the period in the indictment?

MR. WASHOR: No, I waive absolutely nothing. Like every counsel, we have taken our positions. They are clear on the record. The Court says he is not going to give that instruction.

MR. LEVINE: I think it is clear the Court will give the instruction if defendants' counsel for the particular defendants request it.

THE COURT: Yes, that is true. Let's not have any misunderstanding.

MR. WASHOR: There were no prior acts on behalf of the defendant Smith. What am I supposed to request the Court to charge, your Honor?

MR. ROSENBERG: I do not request that it be charged.

MR. GRISORIO: And I do not request it.

MR. LEVINE: Your Honor, the defendant Smith could still request it if he wished, because the limiting instructions have been given by the Court on several occasions after defendant Smith's request. We are dealing with a specific instance here of a request to charge, and if the defendants don't want it, then it ought to be clear on the record for this Court and for any possible appellate court.

MR. GRISORIO: Mr. Rosenberg and I have made it quite clear that we do not want it.

MR. LEVINE: The answer is either yes or no on the record and let's get it clear on the record.

THE COURT: Certainly there is no obscurity on the record insofar as Mr. Rosenberg is concerned and Mr. Grisorio is concerned. Mr. Washor suggested a possible alternative to me.

MR. GRISORIO: That alternative is if your Honor was going to charge at all.

MR. LEVINE: Can we hear from the defendant Smith, your Honor, specifically?

MR. WASHOR: Not at all. I don't think the government has the right to inquire what we want to do regarding requests to charge.

MR. LEVINE: Then the government urges the Court charge the jury as the government has requested. If the defendant Smith doesn't make known to the Court what would constitute a waiver on this particular request to charge, then the government urges that the charge be given.

THE COURT: Let's put it this way, Mr. Washor --

MR. WASHOR: Is this going to be reversible error one way or the other? I doubt it most seriously.

THE COURT: I will give a prior act or related charge which I regard appropriate if you request me to do so.

MR. WASHOR: I do not make any request of you, your Honor.

THE COURT: All right.

(In open court.)

THE COURT: I have no additions or amendments to the charge.

Consequently, the jury is about to commence its deliberations. It now becomes my duty to discharge our two alternate jurors, Mr. O'Connell and Ms. Duff. I do so with deep appreciation to you both. You have been just as faithful in your attendance at this trial as the first twelve jurors were. You have been just as prompt and attentive to the evidence, and you have fully participated in this trial and assisted this Court.

It has happened, happily, that the occasion has not arisen making it necessary for you to replace one of the twelve first chosen jurors, but you were present and ready and willing and able to do so had the occasion arisen, and it follows from that that, just as the twelve other jurors have, you have rendered real public service to this Court and to the proper administration of justice. And I hope you leave this court with an awareness of my own gratitude and appreciate for it.

You are now discharged from service in this case with my thanks.

Mr. Farley may have some additional appropriate instructions.

(The two alternate jurors were excused.)

THE COURT: I will ask the Clerk of the court to distribute to the jury copies of the indictment.

Ladies and gentlemen, I will now ask you to commence your deliberations. As I said to you earlier, arrangements are going to be made for you for dinner tonight. I trust you will find it sustaining, although it may not be haute cuisine. And also, arrangements have been made to bring you home later this evening.

I will ask you now to retire to your jury room and commence your deliberations.

(At 5:30 p.m. the jury retired to the jury room to commence deliberations.)

.3PM

UNITED STATES OF AMERICA
vs.
MARION KNUCKLES, et al.

77 Cr. 340

New York, New York
July 13, 1977

THE COURT: Let the record show that at two minutes before seven the jury passed out a note to the court clerk which I have marked Court Exhibit 1 of this date. It was received just before, by prearrangement, we had all left for the supper hour from seven to eight, and the fact that we were absent for that matter or that reason has been explained to the jury.

I will read to counsel the note which I received from the foreman of the jury. It reads as follows:

"Dear Judge Haight, may we review and/or listen to the following evidence or testimony:

"1. Agent Brophy's testimony with regard to his recollection of what is on the lab report.

"2. The stipulation with regard to what all counsel agree as to what substance was found on the strainers and the spoon.

"3. Yolanda Valdez Simpson's testimony concerning time and circumstances of departure from her apartment of second shopping bag.

"4. Robert Simpson's testimony as to ( )."

That appears to be the incorporation by reference of the request in paragraph 3.

"5. Defendant Rose Smith's agreement with Special Prosecutor's Office which is in evidence.

"6. Transcripts of all telephone conversations.

"7. Agent Brophy's testimony when cross-examined by Mr. Washor about Rose Smith's statement, 'What took you so long?' or something to that effect, and Mr. Levine's redirect concerning his attempt to clarify Rose Smith's statement."

It is signed by the foreman and that is the full text of the note.

In respect of at least two of the items, I find myself somewhat puzzled because I'm not sure they exist.

MR. WASHOR: May I be of assistance?

MR. ROSENBERG: May I suggest that we take it from the top man. There is no laboratory report. I'm sure that we'll agree as to that and I think that --

MR. WASHOR: Excuse me. This is directed against Smith.

MR. ROSENBERG: I think that in Brophy's testimony they are referring to page 417, when I cross-examined him as to whether or not there were traces and what they were analyzed for and what they found. I respectfully submit that --

MR. LEVINE: Could we take 1 through 7 seriatim?

THE COURT: Oh, yes, we must do that.

MR. ROSENBERG: I would submit that is what they may be looking for, your Honor.

THE COURT: What I would like to do, and I have ordered the limousines for nine -- what I would like to do is to respond to at least one of the requests on this note before they leave and I think that if we can respond to the first listed request, then that will be proceeding in an orderly fashion. Quite clearly problems and questions arise with respect to some of the other items and they are going to have to be addressed later on.

MR. LEVINE: Why don't we tell them that there is no No. 5 and give them No. 6 right away, and then discuss the lab reports, the testimony of "Yogi" and Robert Simpson and the testimony of Agent Brophy, and we are going to have to sit here and read the transcripts in order to agree upon that.

MR. WASHOR: May I be heard? I don't agree with that suggestion. As to item No. 1, there is only one area in the testimony regarding Brophy's recollection.

That is on cross-examination where the agent said he had no independent recollection of what was contained in the lab report, at which time I submitted the lab reports to him. He had them in front of him and he was questioned seriatim as to each report relative to the items in question.

As to No. 2 --

MR. ROSENBERG: May we stay with one? I disagree with Mr. Washor. On page 418 I asked the question as to the chemical analysis. He does speak about analysis and Agent Brophy does say that there was an analysis and it showed no narcotics.

MR. WASHOR: Except the question asked about his recollection.

MR. LEVINE: It is the Government's position, and I agree with Mr. Washor for the first time, that the testimony I think is called for, at least as it relates to recollection, is on pages 440, 441, 442, 443, 444. That is the testimony on at least the cross-examination of Agent Brophy relating to his recollection of the lab reports. At least that is where there was an objection by the Government relating to him testifying on the basis of hearsay documents and not on the basis of recollection.

MR. WASHOR: Your Honor asked for the stipulation --

MR. LEVINE: Let's do one at a time.

THE COURT: I think you must do one at a time. I would like to follow the requests made by the jury in the order that they have made them, if we possibly can, without any delay, rather than jumping down to No. 6, which we all recognize is the transcripts of telephone conversations.

What I'd like to do, if we can, is to agree upon what item No. 1 calls for and bring them in and read it to them.

I will read the request again:

"Agent Brophy's testimony with regard to his recollection of what is on the lab report."

Mr. Levine suggests that it is Mr. Washor's cross-examination of Mr. Brophy which the jury probably has in mind. I would suggest with respect to the pertinent testimony, that it begins on page 438 on line 16 and would then carry through to page --

MR. LEVINE: Your Honor, the Government requests the Court look at page 436, line 23, an answer, "If I might see my report I may refresh my memory." I think that is where he is handed the report.

THE COURT: Yes. I think it should start there. Is that what you are suggesting?

MR. LEVINE: Yes.

MR. ROSENBERG: I think in all fairness the question to some degree is ambiguous. I think page 418 should also be read where we discuss lab reports.

THE COURT: I'm not saying I disagree, Mr. Rosenberg.

MR. ROSENBERG: Thank you, your Honor.

THE COURT: I think quite clearly what Mr. Washor has identified should be read. I agree it should begin on page 436, line 23, as responsive to the jury's first request, and I think it should carry through until, I should think, page 444, line 7.

MR. LEVINE: Yes.

THE COURT: It seems to me quite clear that that particular testimony is responsive to the jurors' request.

Now let's consider Mr. Rosenberg's suggestion.

MR. ROSENBERG: Page 418, your Honor.

MR. LEVINE: The Government submits that in no way does that encompass the request.

MR. ROSENBERG: I think it does, your Honor. We talk about lab reports there.

MR. LEVINE: They don't.

MR. ROSENBERG: They ask him if there was a chemical analysis, Mr. Levine. What does that mean?

THE COURT: The precise question is, "Agent Brophy's testimony with regard to his recollection of what is on the lab report."

MR. LEVINE: I mean, it is not there, your Honor.

MR. ROSENBERG: I don't see any harm, Judge. Many of these questions are ambiguous.

MR. LEVINE: The Government submits that that statement in no way encompasses the request made by the jury.

THE COURT: It says lab report. Now, a number of items were submitted to laboratory analysis. The testimony which begins on page 417, line 23 and goes over to page 418, line 13 refers to the pink bag, Exhibit 2.

MR. LEVINE: It refers to fingerprints, your Honor. I mean, there is no reference to any lab reports.

MR. ROSENBERG: The next few questions --

THE COURT: Page 418, line 6, beginning with the question, "What was it processed for?" Then it goes on to refer to a processing and no traces of a controlled substance.. I think that clearly falls within the request and I think that the reference to no fingerprints forms a nonprejudicial helpful overture to the part. I will permit the jury to hear, in addition to the testimony previously referred to, the testimony beginning at page 417, line 23 extending to page 418, line 10.

MR. ROSENBERG: Thank you, your Honor.

THE COURT: Do counsel suggest there are any other portions that should be read?

All right. Then I propose to bring the jury back and --

MR. WASHOR: Maybe I can help you with No. 2. I have an independent recollection that the stipulation as to the substance on the spoons occurred on cross-examination of the witness Yogi, Yolanda Simpson. I requested the stipulation of Mr. Levine and I got it.

THE COURT: Yes.

Do you have a page reference?

MR. WASHOR: No.

THE COURT: Let's bring them in just to show that we are all alive and functioning and have this testimony read. I will tell them that the other questions are going to require some additional time.

MR. LEVINE: The Government has located No. 3 and No. 7. We have put our finger on them rather easily and we really may be able to do all the rest of it in five minutes.

MR. WASHOR: I would agree with Mr. Levine for the first and possibly the last time in this trial that we take five minutes or so to work out all of their requests. The jury then might be in a better position to work on their deliberations. I would rather do that than to give it to them piecemeal.

THE COURT: All right. We are agreed on No. 1. Why doesn't someone give Mr. Washor a transcript and have him look for #2, then, since he claims he knows where it is.

MR. WASHOR: It is in the cross-examination of Yolanda Simpson.

THE COURT: You can have my transcript.

MR. ROSENBERG: He is using mine, your Honor.

MR. LEVINE: Could the Court just announce on what line on page 443 it intends to conclude the testimony with respect to the lab reports?

THE COURT: My suggestion is that it be at page 444, line 7.

MR. LEVINE: On item 2, your Honor, pages 252 and 253.

THE COURT: Say that again.

MR. LEVINE: Your Honor, I think the reference to the exhibit number is on page 251, line 16.

MR. WASHOR: One of the items stipulated to.

MR. LEVINE: That is correct, and the stipulation actually appears on page 253, lines 2, 3 and 4.

MR. WASHOR: Then we have a little problem when Mr. Levine decided not to stipulate.

MR. LEVINE: I think, your Honor, that it would be 251 line 16 through page 253, line 4, as to request No. 2.

MR. WASHOR: That is only as to one strainer.

MR. LEVINE: I don't think we ever came back to stipulate.

THE COURT: Actually, what the item says is "The stipulation with regard to what all counsel agree as to what substance was found on strainers and spoon."

MR. LEVINE: I don't think there was any such stipulation.

MR. WASHOR: Yes, yes, Judge. I believe that the laboratory reports did not go into evidence, but Brophy was questioned about it. There is a stipulation that on one of the spoons there is cocaine. Then we tried to offer the other spoon in evidence, get a stipulation, and Mr. Levine did not go along with that stipulation. Then the very next time that the matter raised its head, if I'm correct, is when Brophy was questioned on cross-examination by myself. We went through each item that was seized as designated in the lab report.

MR. LEVINE: That we are getting under No. 1.

THE COURT: Yes, let's not repeat ourselves. That is what we agreed we are going to read to them under No. 1.

MR. WASHOR: I don't think there is any dispute nor a doubt in anybody's mind that the answer to Question No. 2 can be answered by the Court.

MR. LEVINE: No, the Government objects, your Honor. The Court should read or have read from the record as it exists at the present time to respond to jury inquiries. Going outside of the record would be improper.

THE COURT: I agree with that. I think we have isolated testimony that corresponds to Request No. 1.

MR. WASHOR: Would you explain to the jury that they are getting part of No. 2 when they get cross-examination in No. 1; that is, that which is contained on the spoons and on the strainers?

MR. LEVINE: No.

THE COURT: I think the proper procedure is to read testimony as to which we are all agree with respect to No. 1. With respect to No. 2, I agree that from page 251 line 16 to page 253, line 4, is responsive to the request in paragraph No. 2, but if that is the only stipulation in the record on that subject, they should simply be so informed. They would have also heard the testimony. I would not undertake to characterize or clarify it further.

MR. LEVINE: With respect to No. 3, I direct the Court's and defense counsel's attention, because I have already found it, to the testimony of Yolanda Valdez Simpson with respect to her departure from the apartment with a shopping bag. That is contained at page 117, line 16 through 22, and the testimony --

MR. ROSENBERG: They asked for a date.

MR. LEVINE: I don't think they asked for a date.

MR. ROSENBERG: Time and circumstances.

MR. LEVINE: Okay. Then I think, your Honor, it would be from line 6 on page 117, which gives the date -- thank you, Mr. Rosenberg -- and Mr. Simpson's testimony, your Honor, is in the vicinity of page 694, your Honor. It starts 694, line 20 and would conclude at line 19, page 695.

MR. WASHOR: I would say you should start on 693, when he comes home after the weekend.

MR. LEVINE: I agree with that, your Honor. I don't have any problem with that.

THE COURT: Where do we start -- 693?

MR. ROSENBERG: Right, on top, your Honor.

THE COURT: All right.

MR. LEVINE: I think at line 18, beginning "Did you return," is probably a logical place. Do you agree?

MR. WASHOR: No. I'm sorry. If you are going to put it in all context, you've got him leaving at the request, staying for the weekend and coming back --

MR. LEVINE: The Government has no objection to 693 from the top.

THE COURT: Through 695 on 19?

MR. LEVINE: Just to get Yolanda, again, your Honor, page 117, line 5, through line 22.

THE COURT: I certainly agree with those particular sections of Mrs. Simpson's testimony and Mr. Simpson's testimony, which are responsive to the jurors' request. I simply don't recall whether the subjects were touched upon on cross.

MR. LEVINE: My recollection is that the subjections weren't touched on on cross with respect to either witness.

THE COURT: I'll leave it to defense counsel to call to my attention any pertinent cross-examination.

MR. LEVINE: Your Honor, 5 is clear. The answer is no.

We have 6, your Honor.

Directing your attention to No. 7, the Government has isolated that testimony. On cross-examination by Mr. Washor -- it is at page 445, or, probably, to be complete, your Honor, you ought to start at 444.

THE COURT: We are discussing Request No. 7; is that right?

MR. LEVINE: That is right. The arrest of Rose Smith and her statement, page 444, line 8.

THE COURT: Yes.

MR. LEVINE: Through to 445, line 11, and on redirect examination --

MR. WASHOR: 445, you say?

THE COURT: 445, line 11.

MR. LEVINE: Yes, that is the answer that they asked for.

THE COURT: I wonder if in fairness -- what do you say to that?

MR. WASHOR: Of course not.

MR. LEVINE: I'm prepared to go to the mat on this one, your Honor. I don't think the further impeachment of Agent Brophy as to whether he wrote it down bears any relevance to the note at all. The note is very specific.

MR. WASHOR: Look at part B.

MR. LEVINE: The note identified both Mr. Washor talking and the Government. It is explicit in that sentence.

MR. WASHOR: Judge, look at part B of their request.

THE COURT: Let's consider the request: "Agent Brophy's testimony when cross-examined by Mr. Washor about Rose Smith's statement, 'What took you so long,' or something to that effect, and Mr. Levine's redirect concerning his attempt to clarify Rose Smith's statement."

MR. WASHOR: They are now looking at the cross-examination of Brophy, what I claimed, at least in argument, I accomplished and what Mr. Levine claimed. To cut it off and not give it to them in toto is unfair. It is obvious from the question that they want what was accomplished on cross and Mr. Levine's attempt, using their language, to rehabilitate him. To leave it out I think is unfair.

THE COURT: I think that is correct. The cross-examination is what quite clearly prompts the second half of the jury's request under paragraph seven of their note and we must include the cross-examination which followed immediately upon the agent's testimony as to the remark itself, so I agree that we begin at page 444, line 8.

MR. WASHOR: It is all the way on to 447.

MR. LEVINE: This gets into what other kinds of advice she was given and it just doesn't relate.

MR. WASHOR: What advice?

MR. LEVINE: 447, line 7. At that point you advised her of the charges. That doesn't relate to the jury's request.

MR. WASHOR: It goes directly to the statement made by Rose Smith showing that he spoon-fed her into a statement.

THE COURT: That is beyond the question. I think we should stop at --

MR. WASHOR: Let's stop at 447, line 6.

MR. LEVINE: Pardon?

MR. WASHOR: 447, line 6, if you are not going to allow the spoon-feeding.

MR. LEVINE: I agree, if the Court is going to adhere to its ruling, that 447, line 6 is all right.

THE COURT: So it will be 447, line 6.

MR. LEVINE: The Government's redirect begins at 445, line 22.

MR. WASHOR: Bear with me one second, Judge?

MR. LEVINE: And it continues through 457, line 19.

MR. WASHOR: I don't think that 457 and 456, the top of it, has to do with Ray Brown. There is nothing whatsoever to do with this witness.

MR. LEVINE: Your Honor, this is the Government's explanation for the statement. The Government's contention all along is that the defendant Rose Smith knew that there was an arrest warrant for her and Raymond Brown and that Raymond Brown had already been arrested and that is why, "Hey, I've been waiting for you.

"Yes, you've gone to the mat again."

MR. WASHOR: Yes. I withdraw my objection. Mr. Levine for the second time is correct.

THE COURT: I think what the Government says is correct.

MR. WASHOR: It goes on to 457.

THE COURT: 457, line 19.

MR. LEVINE: At that point we can go on to ask him about something else.

THE COURT: Are we all agreed with respect to Request No. 5?

MR. WASHOR: Excuse me, Judge. Getting back to the last one, No. 7, the question on page 457, of course, is not going to be read to the jury.

MR. LEVINE: Oh, no.

MR. WASHOR: The objection was sustained. You can't read that to the jury.

MR. LEVINE: If that question isn't read to the jury, lines 18 and 19 make no sense.

MR. WASHOR: They may make no sense, but the Judge ruled that the question was proper and sustained the objection. How can you give the jury that which is not in evidence?

MR. ROSENBERG: No question about that.

THE COURT: I think we should read down through page 457, line 9 and stop there.

MR. WASHOR: That very question was objected to, from line 4 to line 9, and you sustained my objection. How can you read that question to the jury? It is not in evidence. Remember, it is the question plus the answer that makes up the evidence, not the question itself. The question was eliminated by your Honor's ruling. I suggest it is not in evidence, it has no probative value, and cannot be read to this jury.

THE COURT: But the question that appears on page 457, line 18 was not objected to and was answered.

MR. WASHOR: I have no objection to that.

THE COURT: But if you just read that without reading the question that appears on page 457, line 4 it makes no sense.

MR. ROSENBERG: I would submit you just can't read a question, the objection to which was sustained.

2 MR. WASHOR: May I make a submission on this matter? Unfortunately, during the height of a trial everything is clear in the mind of the questioner, possibly the jury and the person being questioned, so that line 18 at the time that the incident occurred is not taken out of context, but that happens to be one of the problems not against the Government, per se, but against anyone that is put in the position of asking an improper question having an objection lodged and having the Court rule upon it, once the Court rules that the objection is sustained you cannot in light of the fact that it may obliterate the following question -- what are you going to tell this jury now: Pay no attention to that first question?

THE COURT: The problem is that the objection to the first question was sustained because it required possible speculation as to the workings of Mrs. Smith's mind, but it was fixed up, the objection was fixed up by the question at page 457, line 18, which reads:

"Mr. Brophy, didn't she tell you that" --

if she had told him that, then the witness is no longer speculating about the operation of the defendant's mind.

MR. WASHOR: Told him what?

THE COURT: What was referred to in the previous question.

MR. LEVINE: Exactly.

MR. WASHOR: I think what you are doing, I know you are doing it in all clear conscience, you are assuming something that is not a fact in evidence.

MR. LEVINE: It is a leading question.

MR. WASHOR: You can't supplement, clarify and interpolate testimony. I don't know what that question refers to. I do know one thing, that the question that was asked by Mr. Levine was objected to and the objection was sustained. If that has any kind of legal value, that means it is not in evidence, and when a jury asks to have evidence read back to them they are talking about and can only get legally admissible evidence, the same way Mr. Levine wouldn't go along with the Court explaining what stipulations there are and your Honor finding that appropriate.

THE COURT: The vice of the question was cured, and there is no way that the next question that was put makes sense without a reference to the prior question.

MR. WASHOR: Isn't that the problem of the prosecutor, not so much the problem of the Court and the defense? He should have rephrased his question properly and not asked the question based upon something that was improperly asked the first time. I mean, can you imagine, Judge, in all conscience, if this procedure is tolerated, every time there is a question, an objection to which is sustained, you just incorporate another one.

THE COURT: With respect to the second half of the jury's question No. 7 I'm going to permit the reading from page 455, line 22 through page 457, line 19, including the colloquy on the question. It is only in response to the question and I don't think it violates anything.

Are we agreed with respect to Request No. 5, which reads, "Defendant Rose Smith's agreement with Special Prosecutor's Office, which is in evidence," the jury should simply be told that there is no such agreement?

MR. LEVINE: Yes, your Honor.

THE COURT: I confess I don't know what they are thinking of. They may have in mind Mr. Sims.

MR. LEVINE: They may.

THE COURT: But even there, my recollection is that the agreement with the Special Prosecutor's Office, if by that they mean the State Office, is not available.

MR. LEVINE: There is none. I mean, not a written one.

THE COURT: There is none.

MR. WASHOR: They obviously have made an error. I'm sure it is an error of good judgment.

THE COURT: I think I should tell them that we are all agreed there is no such thing.

MR. LEVINE: The Government would suggest that they take this and that they be told at the conclusion that there is none and that when they get back into the jury room they can write down what they want and pass that on. I think it is poor practice to have the jurors speaking from the jury box.

MR. WASHOR: If you turn to 472 you will find a little more cross-examination on Brophy with reference to Rose Smith's statement.

THE COURT: This relates to Request No. 7.

MR. WASHOR: Page 472. It starts with the Grand Jury minutes.

MR. LEVINE: What?

MR. WASHOR: Read it to page 474.

MR. LEVINE: The Government objects, your Honor.

MR. WASHOR: Of course they object.

MR. LEVINE: There is nothing that relates to that question.

MR. WASHOR: If we take a look at the last question on 474, then not a single bit of testimony was perpetuated in the Grand Jury by this witness against Rose Smith.

MR. LEVINE: They haven't asked for all the testimony by Rose Smith in the trial.

MR. WASHOR: They asked for a statement. The negative is the same thing as a statement.

THE COURT: The precise phraseology is, "Agent Brophy's testimony when cross-examined by Mr. Washor about Rose Smith's statement."

I don't think what you suggest falls within that quesation.

I should say to you that while this colloquy was going on I received another note from the jury which I haven't had time to read. Let the record show that this is a note received by me from the jury at 8:34 p.m.

There are two notes. The first one I will have marked Court Exhibit 2. It reads:

"Dear Judge Haight, at the moment the jury feels it would be difficult to continue deliberations without the documents and other testimony that we have requested. These documents will answer the outstanding questions which now confront us."

The second note, which I will mark Exhibit 3, says:

"The jury would like to listen to Betty McFarland's total testimony.

We cannot accomplish all of these things tonight.

MR. WASHOR: Can't we get them what they asked for regarding their first request right now?

THE COURT: Yes, I think we should bring them in and read that testimony, and then we will deal with the second and third requests perhaps tomorrow. I'm going to recall the jury for that purpose.

MR. WASHOR: Will you give them some time after this rather than telling them you are sending them home now? Would you not take them out after we read all this, give them a little time to deliberate?

MR. ROSENBERG: They can't read the transcripts during those few minutes. They want all the transcripts. What purpose is there in their deliberating further tonight? I think that we should read this testimony and the first thing in the morning give them the transcripts they have asked for.

MR. WASHOR: I want to give it to them now. They are at loggerheads. I want to give it to them now. They asked for it at seven o'clock and it is now a quarter to nine. I think they are entitled to it. I think they also should have a reasonable period of time to deliberate after they get the material in Note No. 1.

MR. ROSENBERG: It is within the Court's discretion. I'll stay to midnight.

MR. LEVINE: I think that they can be given the information asked for in Note No. 1 and Note No. 3 and the transcripts and sent back in there for a half hour. That would take us to about 9:45.

THE COURT: I think they should hear all of the testimony that we have agreed on. It is not long. Then I will give them the other things and let them go on for a while. I'm not going to deal with the third note. They want that testimony in its entirety.

MR. LEVINE: That is very short testimony.

(Jury present.)

THE COURT: Ladies and gentlemen, I have your notes. I apologize for what may seem like bad service, but what happened is that your first note, which I have marked Court Exhibit 1, was received just two minutes before seven and, as I hope Mr. Farley explained to you, I told counsel that between seven and eight counsel and the Court could go to dinner, and then when we came back we dealt with your note, but there are a number of items that were requested and we had to consult with each other and agree upon what the pertinent portions of the testimony were, and we had to consider also certain other questions that came out of your request. We have isolated the testimony you wanted to hear as referred to in Note No. 1 and since it is not long I propose to have that read to you now. I should say we have ordered limousines for nine. They are on standby. What I'm saying is that you can hear this testimony and then receive the additional exhibits that you want and you may continue to deliberate this evening as long as you wish. I leave that entirely up to you.

When the time comes that you have decided you have deliberated enough time and that you want to go home just pass the word.

I will very quickly read Court Exhibit 1. The requests are as follows:

"1. Agent Brophy's testimony with regard to his recollection of what is on the lab report.

"2. The stipulation with regard to what

all counsel agreed as to what substance was found on the strainers and the spoon.

"3. Yolanda Valdez Simpson's testimony concerning time and circumstances of the departure from her apartment of second shopping bag.

"4. Robert Simpson's testimony as to the request listed above in 3.

"5. Defendant Rose Smith's agreement with Special Prosecutor's Office, which is in evidence.

" 6. Transcript of all telephone conversations.

"7. Agent Brophy's testimony when cross-examined by Mr. Washor about Rose Smith's statement, 'What took you so long?' or something to that effect, and Mr. Levine's redirect concerning his attempt to clarify Rose Smith's statement."

With respect to requests 1, 2, 3, 4 and 7 you've asked for testimony. We have isolated the testimony. We have agreed upon it, and I will ask the reporter to commence reading that testimony now.

The testimony responsive to the first request, Agent Brophy's testimony with regard to his recollection of what is on the lab report begins on page 417.

(Record read.)

THE COURT: The second request: "Stipulation with regard to what all counsel agreed as to what substance was found on the strainers and the spoon."

Turn to page 251.

(Record read.)

THE COURT: That completes the redirect and that completes the testimony of your first note.

Your Request No. 6 refers to transcripts of all telephone conversations and those will be handed to you.

Your Request No. 5 reads:

"Defendant Rose Smith's agreement with Special Prosecutor's Office, which is in evidence."

Counsel and the Court are in agreement that there is no such agreement involving the defendant Rose Smith in evidence. If you wish to reconsider that request clarify it for us further and I will be pleased to proceed with further inquiry, but there is no such agreement of the defendant Rose Smith with the Special Prosecutor's Office or with anyone else in evidence.

While we were completing our consideration for your first request we got the second memo which I have marked Court Exhibit 2, which in effect says, fairly enough, that you couldn't continue your deliberations until we responded to the first note. Then that was accompanied by a note which was I have marked Court Exhibit 3, which says, "The jury would like to listen to Betty McFarland's total testimony." That is easy enough to comply with. We can do that right now, if you'd like, or you can retire to your jury room and consider what you have just heard and the transcripts.

What is your pleasure?

THE FOREMAN: I think tomorrow.

THE COURT: You have heard this testimony. You will find waiting for you first thing in the morning the transcripts of the telephone conversations. We will review first thing in the morning Miss McFarland's total testimony, and then we will respond to all of your requests. I'm deeply grateful to you. I would suggest that we resume, if it is agreeable to you, at 9:30 in the morning. Is that all right?

Let's try to come directly to the jury room. Please remember my instructions against discussing the case among yourselves continues to stay in effect not just tonight but when you come here tomorrow morning. Some of you will get here earlier than others and I ask that you not discuss the case at all until all twelve of you appear and that you formally commence your deliberations then. All twelve of you must be active in every aspect of the deliberations.

There should be cars waiting for you, but I suggest you go to the jury room and wait for the marshals to conduct you to them. See you tomorrow morning. Thank you very much.

(The jury left the courtroom.)

MR. WASHOR: I have an application as to the transcripts. I respectfully state that while they are admissible in evidence, under my understanding of the law they are only for the purpose of being a guide when they listen to the tape, so I object to their going into the jury room. I have no objection if they want to listen to the tape and use the transcripts as a guide. It is not the best evidence. It cannot be substituted for what they hear.

MR. LEVINE: There is a case on tapes that permits transcripts to be sent into the jury room.

THE COURT: Without the tapes?

MR. LEVINE: That is right. Given a few minutes the Government can put its finger on it.

I think it is clear that the jury has been advised of the probative value of the transcripts. They can consider them like they are considering all the other testimony that has some limit to the weight they are supposed to give to it.

MR. WASHOR: There is a reason. It is not because of the inaccuracies, but you must recall there is voice interpretation, inflection in voice when statements are made, whether it is in the form of question or surprise. Those things can be determined audibly by a jury when they listen to the tapes. When they read the transcripts they purport to be words and/or phrases as punctuated by the writer. It doesn't demonstrate the inflection, especially in line with the fact that in final argument your Honor allowed the fact that Mr. Sims during the course of the conversation acted in great surprise when he heard Yolanda Simpson mention silver quarters. Now, if you look at the transcipt the words were exactly as stated on the tape, but it does not reflect whether it is surprise, whether it is a question mark, whether it is a matter of fact. The only purpose of the transcript is as a guide. It is not a substitute for what they can hear. The evidence is the tape itself.

THE COURT: One practical difficulty, Mr. Washor, is that the jurors may wish to have the tapes, the transcripts of all tapes before them, and then make those transcripts the subject of discussion between the jurors, which is a little difficult sitting there with earphones clapped over their heads. I have dealt with this subject, the relationship of the transcripts to the tapes themselves as exhibits in my charge, but I frankly am not certain of what the practical consequence of that charge is now that this particular request has been made by the jury.

MR. LEVINE: They asked for it.

MR. WASHOR: The fact that they asked for it -- if they ask for something they are not entitled to, that doesn't mean they are entitled to it. We have a practical problem which I think is solvable. We have tape recordings, four of them, which are reasonably short.

Secondly, they are audible so that there is no great problem as to deciphering what is on them. If the jury wants to listen to the tapes they can listen to the tapes and I think they can listen to them either in the jury room or they can listen to them here in the courtroom.

THE COURT: They don't say they want to listen to the tapes. They say they want to read the transcripts.

MR. WASHOR: The mere fact that they want to read it, does that mean that the Court is authorized by law to give them their request?

MR. LEVINE: Does Mr. Washor have any support for his request?

THE COURT: It is quite clear that they don't want to read or listen to them tonight. If you have authorities we will receive them first thing tomorrow morning.

MR. WASHOR: So that they are still in deliberation, Judge?

THE COURT: It would seem so. Perhaps we should wait until they leave.

MR. WASHOR: Or at least until they say they want to retire for the evening.

THE COURT: Yes.

(Pause.)

THE COURT: I'm advised that the jurors are leaving, but kindly wait until we give you clearance.

(Trial recessed until 9:30 a.m., July 14, 1977.)

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United States of America

v.

77 Cr. 340

Marion Knuckles a/k/a
"Glenn", Raymond Brown and
Rose Smith

New York, New York
July 15, 1977

(Trial resumed.)

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(11:00 a.m.)

(In open court; jury present.)

THE COURT: Good morning everyone. We all have our blackout of '77 stories, I am sure. I will tell you mine.

After you left on Wednesday night into your limousines, which got you all home safely, I hope, my law clerk and I went upstairs to the 29th floor where my chambers are to get some papers and as we were up there and just before we got on an elevator, all the lights went out, so we eventually walked down the 29 floors and discovered in the process that of the emergency lights that are meant to be in the stairwell and come on in these circumstances, about four out of five of them don't work.

So we worked our way down by lighting a series of rolled up pieces of yellow legal pad and using them as torches. I was a little apprehensive about that because I didn't want my eventual obituary to say that Judge Haight was best remembered for the fact that in the second year of his service he burned down the Federal Court House.

I was determined to try to get home and we eventually did so. It is all working out reasonably well, I guess.

The last request that was made, we did not act upon on Wednesday night was contained in the note from the jury, which I have marked Court Exhibit 3, and which says "The jury would like to listen to Betty McFarland's total testimony."

We have that now and I am going to comply with that request and we will read the McFarland testimony. as soon as I can find it.

MR. ROSENBERG: It starts at Page 739, I believe, your Honor.

THE COURT: 739, thank you very much.

Mr. Reporter, we are going to need to read the testimony of Betty McFarland and it begins at Page 739 of the transcript.

(Testimony read.)

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THE COURT: That completes the testimony of Miss McFarland.

Mr. Farley, do we have the jury's note, Court's Exhibit 1?

THE CLERK: Yes, your Honor.

THE COURT: The remaining outstanding request from Wednesday night, ladies and gentlemen, is you asked for transcripts of all telephone conversations. I am going to send those in to you. I am satisifed by the cases, particularly United States v. Koska that I have the discretion to do that. I will point out to you, however, as I said to you earlier, the original evidence are the tapes themselves and the transcripts, which are stipulated to be accurate, are for your assistance in understanding the tapes and they were admitted into evidence for that purpose. I will send them toyou as you requested, but you may, of course, at any time, if you wish, also ask to hear the tapes themselves. That is up to you as to whether or not you wish to do that.

So, we have completed the McFarland testimony. I will ask you to go back to your jury room and I will have the transcripts sent in to you.

I think it would be a useful thing also, Mr. Farley, to make arrangements to have lunch sent in to the jurors.

THE CLERK: Yes, your Honor.

(The jury left the courtroom at 11:20 a.m. to resume their deliberations.)

(Timenoted: 12:10 p.m., a note was received from the jury.)

(In open court; jury not present.)

THE COURT: I have another note from the jury. It has been marked Court Exhibit 4. Let me just read it to you.

(Court Exhibit 4 was marked.)

THE COURT: "1. May the jury please see the interview statement signed by Rose Smith which is in evidence and which was completed shortly after she was taken into custody by Agent Brophy.

"2. Stipulation as to date of Exhibit 11."

I entirely forget Exhibit 11.

MR. LEVINE: It was an oral stipulation, your Honor, August 30, 1976.

THE COURT: Thank you.

"Paragraph 3. May we see telephone bills."

"Paragraph 4. Re conspiracy charge. The charge said something like 'a conspiracy is a partnership.' It also said '(accessory) is not a conspirator.'

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A partnership can have employees (law firms do). Can the Judge answer the question: Are employees conspirators?

"Alternatively, can he reread the relevant parts of the charge what does and what does not constitute conspiracy."

Then the last request, Paragraph 5 says:

"Any testimony, direct or cross, of Yolanda Simpson re redoing the quarters prepared around the 1st of October in her apartment at 626 Riverside."

Let's consider those in order.

There is no difficulty in showing them the Rose Smith interview, but I think it appropriate in doing so that I direct their attention to the fact that it has been redacted: That that explains the balloons with arrows and the words like "other persons or other person".

I propose to instruct them that that was done because under the rules of evidence, Mrs. Smith's statement cannot be considered against anyone else.

I propose to instruct them that they are not to speculate on what names might have been there originally and that for them to make a determination as to the guilt of any other individual, that determination must be based upon evidence in the record, if they find it, and they are not to consider it with respect to the other individuals, the Smith statement, although it may, as I said in the original charge, be considered if they wish to, for whatever weight they wish to give to it to Mrs. Smith herself.

Does that seem appropriate to you?

MR. LEVINE: Yes, your Honor, to the government.

THE COURT: As to request No. 2, I will simply tell them it is August 30, 1976.

The telephone bills can be delivered to them.

With regard to their inquiry about conspiracy, I simply proipose to reread to them the pertinent part of the charge.

MR. WASHOR: Your Honor, may I just request, I am trying to interpolate the request myself, they talk about partnerships, they talk with employees. There was a point in your charge where you indicated "mere association". I am guessing, of course, that the parentheses that you indicated that is contained in the note might refer to that aspect of it so that I would ask that you include with your rereading of the charge those statements of the law that are pertinent to mere knowledge, mere presence and mere association.

THE COURT: I think you are right and I am going to certainly do that.

Then the final request -- listen to this again -- any testimony, direct or cross, of Yolanda Simpson re redoing the quarters prepared around the 1st of October in her apartment at 626 Riverside.

Redoing the quarters.

MR. GRISORIO: I seem to remember something to that effect, your Honor, that she had to redo a certain amount of these quarters.

MR. LEVINE: Your Honor, there was testimony concerning redoing quarters in a prior similar act in 1975 over the Satin Doll Bar and those quarters were redone. That is perhaps what the question is related to.

MR. ROSENBERG: That was on direct?

MR. LEVINE: That is correct. There weren't any questions about it on cross examination.

THE COURT: Yet the inquiry refers specifically to around the 1st of October.

MR. WASHOR: Judge, the problem that that presents is that in explaining to the jury what seems to be agreed upon by all of us that they are in error as to part of their factual basis for their question, that if you are going to allude in answer to their question, which I think you must, I am going to request and I do request your Honor in answering the question to admonish them that those prior acts cannot be considered against the defendant Rose Smith.

You see, if it is the prior similar act theory wherein that very testimony emanated by reason of the Court's ruling during the courseof the trial and, most candidly, even after the entire trial is in, those prior similar acts are only offered against the co-defendants and cannot in any manner or form be binding against the defendant Smith.

I think it is only fair that in answer to the question, first, that you straighten out the time differential, and, secondly, that you admonish them that that may not be considered against the defendant Smith.

THE COURT: If we are all agreed, I gather, that the reference to "redoing quarters" refers to a prior incident, I think it is right that the jury should be advised that counsel are in agreement on that point and then it does seem to me appropriate to reiterate the more or less standard prior act instruction and it would relate not only to not being binding against Mrs. Smith, but also the limited purposes for which it may be received against the defendants who are involved.

I think that is what I will have to do.

MR. LEVINE: Your Honor, in reviewing the Rose Smith statement, the word "cooperation" still is in, although it wasn't read to the jury. Perhaps if you give the government a moment we could just go back and Xerox that one page.

THE COURT: I think that should be done, Mr. Levine, but let me bring the jury in and we will deal with these requests and I will say that will be sent in.

MR. ROSENBERG: Why can't it just be read, your Honor?

THE COURT: Because they have asked to see it.

MR. LEVINE: Your Honor, here are the telephone toll charges, Government Exhibits 16, 17 and 17-A.

(Jury present.)

THE COURT: Ladies and gentlemen, I have your note, which has been marked Exhibit 4. The first request is as follows:

"May the jury please see the interview statements signed by Rose Smith which is in evidence and which was completed shortly after she was taken into custody by Agent Brophy."

That document will be sent into you very shortly after you return to your jury room.

There is a particular instruction that I need to give to you about Mrs. Smith's statement. When you look at the document you will see that it has been what we lawyers refer to as redacted, which means that in certain areas certain words have been eliminated and other words have been put in.

Now, the purpose for that is to eliminate from the document certain other names that appeared on the document in its original form and to substitute for those names a phrase such as "other persons" or "other person".

You will see this when you see the document and I want to explain toyou the reason for it. Under our rules of evidence, the statement, which Mrs. Smith prepared, in the circumstances under which it was prepared, as you heard, may, if you wish, be considered by you in your determination of the guilt or innocence of Mrs. Smith. As I said in my original charge to you, whatever weight you wish to give that statement with respect to the government's case against Mrs. Smith is entirely up to you evaluating all the circumstances.

But what you may not and must not do is to consider that particular statement in any way with respect to the guilt or innocence of any other defendant. That statement under the circumstances under which it was given is inadmissible and not binding upon anyone else and it is to implement that rule of law that the statement was redacted in the manner which you will see.

Consequently, you are not to speculate as to what the original form of the document was.

The guilt or innocence of any other defendant must be determined by you solely upon the basis of the evidence that was admitted in respect of such other defendants and this statement, I say again, is inadmissible against anyone other than Mrs. Smith and can be considered only with respect to the government's case against her.

The second request is a stipulation as to the date of Exhibit 11. I have consulted counsel and they are in agreement that the date of Exhibit 11 is August 30, 1976. August 30, 1976.

Your third request is "May we see the telephone bills."

Of course you may. They will be sent in to you.

The fourth request raises questions about the conspiracy charge and the elements of the conspiracy, I think the best way for me to respond to that request is to read to you now the pertinent section of the charge, which I gave originally, on the subject of conspiracy. That is what I will now do.

In order to convict any of these three defendants on trial, the government must prove beyond a reasonable doubt the following essential elements with respect to conspiracy.

You understand I am speaking only of Count 1, the conspiracy count.

1, the existence of the conspiracy charged in the indictment, that is, agreement or understanding to violate those provisions of law which prohibit the distribution or possession with intent to distribute heroin.

2, that the defendant under consideration knowingly associated himself or herself with and participated in that particular conspiracy, and

3, that at least one of the conspirators knowingly committed at least one overt act in furtherance of the conspiracy within the Southern District of New York.

Now, let us consider the first element necessary to constitute a consiracy. The idea of a conspiracy is simple. A conspiracyis a combination, agreement or understanding of two or more persons to accomplish by conc[illegible]ed action a criminal or unlawful purpose, in th[illegible]ance to distribute or possess with intent to distribute a controlled substance, to wit, a narcotic drug.

The gist of the crime is the unlawful combination or agreement to violate the law. The success or failure of the conspiracy is immaterial to the question of the guilt or innocence of a conspirator.

To establish a conspiracy the government is not required to show that two or more persons sat around a table and entered into a solemn pact, orally or in writing, stating that they have formed a conspiracy to violate the law, or the details or the means by which its object was to be achieved. Common sense will tell you that when persons, in fact, undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. It is rare that a conspiracy can be proved by direct evidence.

What the evidence must show in order to establish that a conspiracy existed is that two or more persons in some way or manner, through any contrivance, impliedly or tacitly, came to a common understanding to violate the law or to accomplish an unlawful plan.

The period of time charged in the indictment runs from on or about August 1, 1976 to May 5, 1977. It is not necessary for the government to prove that the conspiracy started and ended on those specific dates.

A conspiracy continues for as long as the evidence shows the conspirators intended to continue. It is sufficient if you find that, in fact, a conspiracy was formed and that it existed for some substantial time within the period set forth in the indictment and that at least one overt act was committed during that period.

In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged conspirators which were done to carry out an apparent criminal purpose.

The adage "Actions speak louder than words" may be applicable here.

Usually the only evidence available is that of disconnected acts and conduct on the part of the alleged individual co-conspirators, which acts and conduct, however, when taken together in connection with each other and considered as a whole, permit an inference that a conspiracy existed as conclusively as by direct proof.

You must first determine whether or not the proof established the existence of the conspiracy as charged in the indictment. In deciding this first element you must consider all the elements that have been admitted with respect to the conduct, acts and declarations of each alleged co-conspirator and such inferences as may be reasonably drawn therefrom.

In thinking about that I am quite sure it was a typographical error in the charge. Let me read that paragraph again.

You must first determine whether or not the proof establishes the existence of the conspiracy, as charged in the indictment. In deciding this first element, you must consider all the evidence which may have been admitted with respect to the conduct, acts and declarations of each alleged co-conspirator and such inferences as may be reasonably drawn from such evidence.

It is sufficient to establish the existence of the conspiracy if from the proof of all the relevant facts and circumstances you find beyond a reasonable doubt, as I have defined that phrase to you, that the minds of at least two alleged co-conspirators met in an understanding way to accomplish by the means alleged one or more objects of the conspiracy as charged in the indictment.

If you do conclude that the charged conspiracy did exist, you must next determine the second element, namely, whether the defendants on trial or any of them was a member of the conspiracy.

Their participation in the consiracy, if you have first found that one did exist, must be established by the evidence of their own acts, statements and conduct, as well as those of the other alleged co-conspirators, and the reasonable inferences to be drawn therefrom.

To find any one of these defendants i- this case guilty of conspiracy, you must find beyond a reasonable doubt that, aware of the existence of the conspiracy and of its purpose, he or she was an alleged participant with the intent to advance its purposes. To become a member of a conspiracy a particular defendant need not know all the other members, their respective roles, nor all the details of the conspiracy. Each member may perform separate and distinct acts and at different times.

Some conspirators may play major roles while others may play minor roles.

In a word, it is not required that a person be a member of a conspiracy from its very start. A single act may be enough to draw one within the ambit of the conspiracy providing the proof establishes that aware of the conspiracy he or she knowingly associated himself with it and participated therein.

However, mere knowledge or acquiescence in the object of the purpose of the conspiracy is not sufficient. More is required.

This something more is generally described as a stake in the venture or a stake in its outcome. While a financial stake in the venture is not essential, if you do find that a particular defendant had such an interest, this is a factor that may be considered by you in deciding whether or not a defendant was a member of the conspiracy, if you find that a conspiracy existed.

One may join an existing conspiracy at any point during its progress and however limited his or her role, if he or she, in fact, joined it and participated in it, then he or she is responsible for all that had been done even before he or she joined and that may be done thereafter in furtherance of its objects.

A conspiracy has sometimes been described as a partnership in criminal purposes. Simply stated, by becoming a partner, an individual assumes all the previous liabilities of the partnership.

Once you are satisfied beyond a reasonable

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doubt that a conspiracy existed and that the defendants on trial, or any one of them, became a member, then the acts and declarations of any other person found to be a member made during the pendency of the conspiracy, and in furtherance of its objectives, are considered the acts and declarations of the defendant.

Thus, if you find a conspiracy as charged existed of which the witness Mrs. Simpson was a member, then the distribution of heroin or possession of heroin with intent to distribute or any sale of heroin or any discussion or act about heroin to further or arrange such a distribution or sale would be binding upon Mr. Knuckles, Mr. Brown, Mrs. Smith, the defendants on trial, if, but only if, you further find that they or any of them were members of the conspiracy.

This would be so even if such acts were committed when the defendants on trial were not present.

Summing it up in a simple way: If, in fact, there was a partnership in crime, each partner acts and speaks for each other in the furtherance of the partnership business, whether or not the other was present. The existence of a conspiracy and one's membership therein may be established by direct evidence or circumstantial evidence.

Conspiracies are rarely susceptible of proof by direct evidence. Usually they are established as a matter of reasonable inference based upon circumstantial evidence.

As I charged you earlier, direct evidence is where a witness testified to what he saw, heard and observed and what he knows of his own knowledge, that which comes to him by virtue of his senses.

Circumstantial evidence, as I have also said, is where facts are established from which the terms of common experience one may logically infer other facts that are sought to be established.

Circumstantial evidence, if believed,is of no less value than direct evidence for in either case, whether circumstantial or direct evidence is being offered for your consideration, you must be convinced beyond a reasonable doubt as to the guilt of a particular defendant.

In this case the government relies upon both direct and circumstantial evidence.

Whether a particular defendant knowingly and intentionally participated in the claimed conspiracy presents issues of fact, clearly, these issues concern what is in one's mind. Medical science has not as yet devised an instrument whereby we can go back to the time of the occurrence of events and determine what was then a person's intent or knowledge.

These issues must of necessity be determined from one's acts, his conduct, surrounding circumstances and such inferences as may be reasonably drawn therefrom.

I wish to add one word of caution. Mere association of a defendant with an alleged conspirator or conspirators does not establish his or her participation in a conspiracy, if you find that a conspiracy did, in fact, exist.

So, too, mere knowledge by a particular defendant of a conspiracy or any illegal act on the part of any other alleged conspirators is not sufficient to establish a particular defendant's membership in a conspiracy.

Before the inference may be drawn that a defendant was a member of the conspiracy, you must, as I have already instructed you, be satisfied from the evidence presented by the government that this particular defendant knowingly associated himself with the conspiracy with the specific intent to aid the accomplishment of its unlawful purposes.

It is important to remember that in deciding this question of association and participation, you must look only at words and deeds of the defendant whom you are considering in deciding if that individual has been shown by the evidence to have been a member of the conspiracy.

The actions of others do not determine whether a particular individual is a participant. The words and deeds of each particular defendant you are considering and the legitimate inferences therefrom alone will determine whether he or she is a member of the conspiracy.

Proof of a particular individual's participation must be substantial and not slight. Thus, in considering whether a particular defendant was a member of a conspiracy, you must do so independently of the acts or declarations of the other alleged co-conspirators.

In other words, whether the defendants, or anyone of them, was a member of the conspiracy or joined the conspiracy must be determined on the evidence which you accept as to his or her own actions, conduct, statements and declarations, if any, of his or her own connection with the acts in aiding the other alleged co-conspirators and not on the independent acts and statements of anyone else. You are the sole judges of the evidence on those points.

Now, also on the subject of conspiracy, I

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said this:

Although the indictment charges a single conspiracy, it would be possible to find separate conspiracies, one relating to the distribution and possession of two thousand quarter bags of narcotics, which were processed in the 626 Riverside Drive apartment of Yolanda Simpson, and the other relating to 500 quarter bags of a substance which the government's witness, Betty McFarland, says the defendant Knuckles gave to her for distribution and which substance she subsequently returned to defendant Brown to give back to defendant Knuckles.

I said it would be possible for you to find that these transactions comprised two separate conspiracies. It is also possible for you to find that they formed a part of the same conspiracy. Whether or not there was one conspiracy or two conspiracies or no conspiracy at all is a fact for you to determine in accordance with these instructions.

Proof of several separate conspiracies is not proof of a single overall conspiracy charged in the indictment unless one of the several conspiracies, which is proved, is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators.

If you find that no such conspiracy existed, then you must acquit.

However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant.

In other words, to find the defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.

It follows from what I have said that you will not consider any acts or declarations against any defendant unless you find beyond a reasonable doubt that the person doing the act and making the declaration was a member of the same conspiracy as was that defendant, and that the conspiracy you have found was the conspiracy alleged in the indictment.

Now, those are the prior instructions I gave you on the subject of conspiracy and I hope they will be helpful to you within the context of the question that you sent to me.

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The last request that you gave me read as follows:

"Paragraph 5. Any testimony, direct or cross, of Yolanda Simpson re redoing the quarters prepared around the 1st of October in her apartment at 626 Riverside Drive."

Now, I have taken that question up with counsel and they are in agreement, as am I, that while there was evidence with respect to redoing quarters, that evidence related not to the alleged October 1st incident, but related instead to a prior transaction concerning which you also heard evidence.

Now, I want to say to you, or really to repeat to you, what I said during the trial when evidence of prior acts or transactions was coming in.

Our rules of evidence forbid you from considering such other or prior acts as tending to prove the character of the person who was involved in such acts in order to show that he performed the acts which are charged in the indictment. Evidence of such prior acts cannot be considered for that purpose.

It may, however, under the rule be admissible for other limited purposes with respect to the transactions charged in the indictment such as proof of motive or opportunity or intent or preparation or plan or knowledge or identity or absence of mistake or accident with respect to the transactions alleged in the indictment.

I thought it best to reiterate those instructions with respect to the purpose for which you may consider evidence of prior acts or transactions and the additional caution I must give you is that because these were prior acts and transactions, they do not relate to either the conspiracy or the substantive act charged in this indictment and, consequently, evidence of prior acts or transactions may be considered for the limited purpose I have given to you with respect to the actors themselves, the people who were performing the prior acts or transactions, but they may not be considered for any purpose whatsoever with respect to anyone else.

So that, for example, if the evidence of prior transactions or acts did not refer to a particular defendant, the defendant Rose Smith, for example, evidence of such prior acts or transactions may not be considered for any purpose against her.

Now, that constitutes my best effort and the best effort of counsel in compliance with your request.

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We will send in the telephone bills and the Rose Smith interview statement.

I think I should also say to you that I am going to permit counsel and the Court to be absent for a lunch hour from 1 until 2 so if any additional questions occur to you during that particular hour, we will not be readily available to you. I suggest you simply go on with your deliberations, as best you can. If such an inquiry arises, and we will get back to you at 2 o'clock.

All right. You may return to your deliberation room.

(At 12:50 p.m. the jury continued their deliberations.)

MR. LEVINE: Your Honor, the government objects to the Court's charge to the jury of the last item on prior similar acts. With all due respect, your Honor, I think the law is that the prior similar acts may be used against a particular defendant who committed the acts on the particular counts in the indictment on the issue of that individual's intent to commit the crime.

The Court specifically stated that they could not use it against the actor on the conspiracy count or the substantive count and the government specifically offered the prior similar acts against the defendant

Knuckles and Brown particularly on the issue of the conspiracy count, No. 1, to show the background and development of the conspiracy and, No. 2, to show the common plan and design.

If the jury is instructed that they cannot use it in considering the charges in the indictment, then, your Honor, there is nothing else for them to use it for.

What I think is more appropriate is that they cannot use it to determine whether, in fact, the particular act took place, but one of the elements of the crime charged in the conspiracy and the substantive count, your Honor, is the particular defendant's intent to commit the crime and that specifically is the reason that the prior similar act testimony is admissible.

In the Court's charge to the jury on this particular point at this time you did not make that clear. It really left the jury, I think, with the distinct impression that they could not consider the prior similar act testimony against these defendants on the indictment. That is all they are here to do is to consider that indictment.

THE COURT: I am surprised that you say that, Mr. Levine, because what I was doing was reading essentially from the rule itself and certainly what I intended to say to them was that within the context of the present indictment they could consider the prior acts for the purposes set forth in the rule and I then read those purposes to them.

MR. ROSENBERG: That is correct, your Honor.

MR.LEVINE: Your Honor also put a statement in the course of it that they could not consider it against the particular defendant on the charges, on the conspiracy or the substantive counts, and that, your Honor, with all due respect is misleading to the extent that they have otherwise been charged that they must find with respect to a particular defendant his intent to commit even one of the crimes charged.

The similar act evidence comes in on the issue of intent so it is a paradox that you have placed them in, your Honor.

I think perhaps what the Court intended to say was that they could not consider the prior similar act when they decided whetheror not on or about the 1st day of October X, Y or Z possessed a controlled substance or possessed it with intent to distribute, but the intent is of the individual to commit the crime.

THE COURT: We had better listen to what I said, I guess.

MR. ROSENBERG: May I say I think you read it very clearly. You read the whole charge. There were no objections at the time of the charge by Mr. Levine. I think you were very clear in what you said. You actually read from the statute and I found it not misleading. I found it very clear and right to the point, your Honor, and I think you hit it right on the head.

Mr. Levine may have wanted to lean toward the government, but I think you went right down the middle and quoted the law as stated in the statute and I find no objection to your Honor's treating that question as you did.

THE COURT: If I put my foot wrong, it should be fixed up now.

Mr. Reporter, would you be kind enough to go back and find that particular additional charge. It came just towards the end and it realted to the jury's last and fifth request.

MR. WASHOR: I only question one thing with respect to Mr. Levine's understanding. We do have here, and I did not raise the issue before, the name Alan Levine, quite obviously the same one person as Mr. Levine in this courtroom. I am only concerned with one aspect --

THE COURT: You are talking about the Rose

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Smith statement?

MR. WASHOR: That is correct. Might the government consider, acquiescing to obliterating his name? Pains were taken to leave it out during the course of the testimony so that the party trying the case, meaning Mr. Levine, would not in any manner or form be substituting his integrity for anything and everything that occurred consonant with our rules that you cannot do that during the course of a trial.

I didn't ask that his name be obliterated during the course of the trial. I want to know what Mr. Levine's position is now.

THE COURT: Counsel wants to obliterate you, Mr. Levine.

MR. WASHOR: No, not obliterate him, I just want to change his name, Judge.

THE COURT: You want to remove his name from the statement?

MR. LEVINE: I am a terribly small spot on this earth, your Honor.

First, your Honor, I think my name is in the record on several occasions as a result of the cross examination by each one of these attorneys. The government has not brought it out, but they have, your Honor, so they have put the government's prosecutor's credibility in issue here, I think, unfortunately for them. Not unfortunately for them, unfortunately period, your Honor.

Second, the exhibit is in evidence. The government hesitates to go along with anything, your Honor, that would change a piece of evidence after all of the evidence is in and the case has been submitted to the jury, and it is for that reason that the government would oppose at this time modifying the contents of any particular item in evidence.

THE COURT: I think in light of the evidence that has come in, it is not prejudicial. I will let it go in in its present form.

Now, Mr. Reporter, can you find it?

MR.LEVINE: Your Honor, It has all been prepared.

(Record read.)

THE COURT: Are you still concerned, Mr. Levine?

MR. LEVINE: I am, your Honor, but I don't think the Court can do anything about it right now. I didn't mean it that way, your Honor.

I think if the Court is correct in what it thought it said, I think what I was referring to, I was taking a statement out of context. I am still concerned about it, but in the context of everything else that you said, I think it is probably accurate.

THE COURT: All right. I will derive such comfort from that as I can.

We are in lunch recess from 1 until 2.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

(At 2:40 p.m. a note was received from the jury.)

(In open court; jury not present.)

THE COURT: The latest note, Court Exhibit 5, reads as follows:

"1. Is there any reference other than the Exhibit 12-13 to a phone call from Simms to Robert Simpson on October 11th or 12?"

Then continuing, Paragraph No. 1: "Would a tape of a conversation between two witnesses, who are not defendants, be admissible?"

Then a question: "Any tape in which defendant did not speak?"

Then it says "Would like read the government stipulation whether there were any other Simms telephone conversations."

Then Paragraph 2. "Any reference in Yolanda Simpson's testimony, direct or cross, to a use by Glenn of the 727 Riverside apartment other than the eight hour session at the table on or about October 1st?"

Then Paragraph 3. "Hear Exhibits 12 and 13 with coinciding transcripts 12-A and 13-A in front of us."

Now, the last of those three requests I understand perfectly. They want to hear the tapes Exhibits 12 and 13 while following along with the transcripts.

The other requests we will have to discuss. Let me go back to the top.

1. "Is there any reference other than Exhibit 12-13 to a phone call from Simms to Robert Simpson on October 11 or 12"?

MR. WASHOR: I don't think so, Judge.

MR. ROSENBERG: Your Honor, I don't know if that really can be analyzed and answered. All we can do is read back testimony or let them play tapes.

MR. LEVINE: No, I think the Court can comment on the question that is asked.

MR. ROSENBERG: Your Honor, I don't think that we could come to a conclusion. If there wasn't, that is something else in the record, but we can't analyze what the testimony is. They are asking you to analyze whether or not there were other conversations. They are asking you in your memory to go through this record and say whether or not there was other testimony. They are bound by their best recollection. If they want to hear specific testimony, they are entitled to hear it, but they may not, I respectfully submit, your Honor, ask you conclusory was there a reference in this and this and that to another telephone conversation.

THE COURT: I think that is generally true, Mr. Rosenberg, unless, as indeed we have done in the past, we can report to them that all counsel agree that an inquiry of this nature should be answered either yes or some specific response.

MR. ROSENBERG: One point when he was speaking to Yogi, he said he already spoke to her husband.

MR. LEVINE: Your Honor, the defendants -- does the Court mind if I stay seated?

THE COURT: No, certainly not.

MR. LEVINE: Government Exhibit 3531 and 3532 are two reported conversations between the witness Robert Simpson and the witness Warren Simms were provided to the defense counsel in connection with the 3500 material of Warren Simms. I don't think either of the counsel for the defendants adverted to it in the course of their cross examination of either witness. I think what perhaps is on the jury's mind is that there is a reference in the conversation between Warren Simms and Yogi, which is Government Exhibit 12, I think, your Honor, to Warren

Simms having had a conversation with Robert Simpson before he spoke with her and that is probably what the jury is referring to.

That is that conversation, your Honor, but I don't think it has been brought out here.

MR. GRISORIO: I think it would be speculative to think about what would be on the jury's mind. I don't seem to recall any such thing.

MR.ROSENBERG: Your Honor, I think the best you can refer them to that tape wherever he is speaking to Yogi and she starts telling him something, he says I spoke to your husband or I spoke to Robert. Does your Honor recall that?

THE COURT: I recall that.

MR. LEVINE: That is what the question says.

MR. ROSENBERG: We cannot go beyond that.

THE COURT: What do you suggest would be an appropriate response if any?

MR. ROSENBERG: Mr. Levine says that is 12, is that correct, that is in 12? They ask that 12 and 13 be played for them so I think their first request with their last request should be inclusive, that you are going to let them listen to the tapes and draw their own conclusion.

THE COURT: They don't address quite the same point, Mr. Rosenberg. The third request asks to hear the tapes 12 and 13, okay, but the first question is, is there any reference other than Exhibits 12 and 13 to a phone call from Simms to Simpson?

MR. WASHOR: I think the answer is no.

MR. LEVINE: No, I agree. I think the answer is no.

THE COURT: Okay. We all agree on that?

MR.GRISORIO: We all agree.

THE COURT: Then Paragraph 1 goes on to say: "Would a tape of a conversation between two witnesses, who are not defendants, be admissible?"

MR. LEVINE: They have been, your Honor.

THE COURT: They have been admitted.

MR. GRISORIO: They may be thinking of something else.

THE COURT: We have a tape, it is No. 11, between Simms and Mrs. Simpson, neither one of whom are defendants,but it has been admitted, it is in evidence. I suppose I can simply remind them of that fact.

MR. LEVINE: 11, 12 and 13 are all conversations between the witness Simms --

THE COURT: You are quite right.

MR. WASHOR: Judge, may I make a suggestion? You have to be careful you don't get too involved with some of the concepts of the law in an attempt to aid the jury.

The question is probably more puzzling to us, because we are trying to anticipate and guess what is going on in there, the question is really very simple. Is a tape between two witnesses admissible? The answer is yes. I think the Court ought to just stop there and not say why and get involved with all the rules because with the rules of the co-conspirator and if they find a conspiracy and when did the conspiracy terminate and et cetera.

THE COURT: I don't want to go through that again.

MR. WASHOR: My suggestion is you answer it as simply as possible with the single phrase question.

MR. ROSENBERG: I am not happy with that, your Honor. I respectfully think that your Honor first start thinking what has been accepted in evidence is accepted in evidence and is in evidence with whatever limiting instructions or whatever instructions I have given you during the course of trial and in my summation.

MR. GRISORIO: I concur with that, your

Honor.

MR. ROSENBERG: I would suggest you say that is the most I can say to you.

MR. LEVINE: I think the Court ought to specifically refer to the tapes that are in evidence.

MR. GRISORIO: They only asked the question as to whether or not it is admissible and I think that is all that should be given to them.

THE COURT: Yes, they are admissible and that is why certain such tapes are before you as evidence.

MR. WASHOR: Judge, you have to be careful with that because you see there has been testimony, there has been a conversation between Simpson and Simms. This jury might be looking at a negative aspect as to why there is no tape recording of that and, if there is, why it wasn't admissible. I don't know what they are talking about any more than anyone else does in this courtroom, but I don't think we ought to go too far afield. They ask a simple question and I think it ought to be answered quite simply.

MR. GRISORIO: What your Honor just stated is what your Honor said Mr. Rosenberg said. He said not to just say yes, whatever is admitted is admitted and let it go at that. What your Honor just said is something different. What might be admissible under circumstances --

MR. ROSENBERG: Your Honor, if I may, I think with whatever you instructed them in your charge and with whatever limitation you directed them to be guided by during the course of the trial, that is what they are admitted for, and I don't think we can go beyond that.

THE COURT: I think I will tell them the answer to the question is yes and that any tapes which are presently before them were admissible in evidence and, consequently, were admitted and that they should recall whatever instructions I gave at the time.

MR. ROSENBERG: That would be fair.

MR. GRISORIO: I agree with that.

THE COURT: The third head to the monster, it says "Any tape in which defendant did not speak?"

I think what they are really doing there is restating the first question.

MR. LEVINE: The government submits that perhaps what they are asking for there is the portion of the charge relating to statements of liability of co-defendants for statements made in furtherance of the conspiracy, which is a request to charge.

MR. WASHOR: I don't accept that, Judge. That is as much a guess as any guess as you can.

THE COURT I think all they are doing is restating the first question. I think it probably should be prefaced by the phrase "in other words" because they start off by saying "Would a tape of a conversation between two witnesses who are not defendants be admissible? Any tape in which defendant did not speak?" I think it is two ways of saying the same thing, but what I will do is ask them if they want any part of the instructions with respect to -- any part of the charge.

MR. LEVINE: Could you ask them to write that down and bring it back?

THE COURT: Yes.

All right, going on. The next request is "Would like read the government's stipulation whether there were any other Simms telephone conversations?"

Was there such a stipulation?

MR.LEVINE: No, your Honor.

MR. ROSENBERG: It was queried by me, if your Honor recalls, where Simms admitted making a call to South Carolina and I asked Mr. Levine if he had that tape and he said he knows of no such tape, but Simms did admit telephoning him in South Carolina. That is in the testimony.

THE COURT: That is perhaps what they have in mind and perhaps we should try to find that.

MR. LEVINE: Yes, I think so.

THE COURT: What witness would that be?

MR. LEVINE: Simms, your Honor.

THE COURT: I think it is going to be in the transcript for July 8th. I think it was the first day -- well, let's see.

At Page 594 of the record I said that I had considered the Simms-Simpson conversation of the tapes in camera, so it must have come up before then, but the puzzling thing is that it was all direct of Simms until that point.

Of course that relates to Simpson. The question we are struggling with is would like read the government's stipulation whether there were any other Simms telephone conversations. Any other Simms telephone conversations.

I simply don't recall such a stipulation.

MR. WASHOR: No stipulation, Judge.

MR. R[illegible]G: I remember asking him -- will your Honor look at 608, please.

THE COURT: Okay.

But that was in the absence of the jury.

MR.ROSENBERG: That is right. Now I am

looking for where I asked him the question. I did ask him the question.

(Pause.)

MR. LEVINE: Your Honor, I think that perhaps --

MR. ROSENBERG: I have it, your Honor, 637.

MR. LEVINE: There was no stipulation at that time.

THE COURT: No.

MR. LEVINE: Mr.Rosenberg had requested the government's production of that beforehand and the government stated what is in the transcript. Then Mr. Rosenberg apparently went ahead and asked the questions about the phone call. I think there was some reference in Mr. Rosenberg's summation to the phone call that resulted in a colloquy that may have triggered the jury's curiosity about that at this point.

THE COURT: Yes, I just don't think there is a stipulation by the government on this subject.

I think they will have to be told that. We can also ask them if they want to have any particular testimony on a point read to them, but I think we simply have to respond that there is no stipulation of the government.

All right, the second paragraph, let's think

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about this for a moment. "Reference in Yolanda Simpson's testimony, direct or cross, to a use by Glenn of the 626 Riverside apartment other than the eight hour session at the table on or about October 1."

Is there any such reference?

MR. LEVINE: Your Honor, the government submits that relates to storing of the paraphernalia in the apartment a couple of days before the use of the apartment for the eight hour session.

THE COURT: Yes, wasn't there evidence that there was a prior visitation by Mr. Knuckles to the apartment that took place -- well, what am I thinking of? It happened several days before October 1st.

MR.LEVINE: There wasn't a visit by him, your Honor. Yolanda Valdez Simpson testified that after meeting him on 95th Street and Fifth Avenue he gave her certain things and she was told by him to take it up to her apartment and she did that.

MR. ROSENBERG: I would not include that in the question.

THE COURT: I think it is includable. The jury asks for any reference in Yolanda Simpson's testimony to any use by Glen of the 626 Riverside apartment. If he met with her and requested her to take certain objects to the apartment and in response to that request he did so, that is a use by the defendant of the apartment. I gather thatis your submission.

MR. LEVINE: That is correct, your Honor.

THE COURT: Can you find that testimony for me?

(Pause.)

MR. WASHOR: I think what they are referring to there was whether 626 was used as cutting operation prior to the one incident involving the eight hour time period, Judge.

MR. LEVINE: I think Mr.Washor is attempting to do what he has repeatedly told this court it should not do and that is read into the question.

MR. WASHOR: Sometimes you realize you are wrong.

THE COURT: I would construe the testimony with respect to the carrying of objects or the storing of objects by Mrs. Simpson at her apartment in response to requests by Mr. Knuckles as falling within this request and it seems to begin about Page 96.

MR. LEVINE: Yes, your Honor, and I think it concludes at Page 100, line 16. Line 22, I believe.

THE COURT: Where do you say it begins?

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MR. LEVINE: I suggest, your Honor, it begins Page 96, the last line, line 25.

THE COURT: Yes, I think so. Of course, the last line of Page 96 begins with a question "Following that conversation with Glenn". I wonder to put that in context we should start a little earlier.

MR. ROSENBERG: Your Honor, I am up to Page 98 and I don't think 96 had anything to do with it.

MR. LEVINE: Your Honor, to make it whole, it perhaps ought to start at line 14.

MR. ROSENBERG: Your Honor, on Page 98, line 17:

"Q Did there come a time when he showed up?

"A Yes."

THE COURT: The reference in the jury's question is to a use by Glenn of the apartment.

I think we have got to put it in context. I will permit the reading to start at page 96, line 10. And go through to Page 100, line 22.

MR. ROSENBERG: Your Honor, don't you think it should start at the bottom of 99, that evening we met outside the building with Gowen and Glenn.

What did you do?

That is what I did.

Then it goes to 626 Riverside Drive.

That is all that should be read, not a whole rehash of five or six pages which don't really indicate what they are asking.

THE COURT: No, I think the testimony about the apartment and the defendant's interest in it fairly falls within the concept of use and begins at Page 96.

MR. LEVINE: Could you give me a few moments to put these ear phones on the jurors' chairs.

THE COURT: Yes, go ahead.

(Pause.)

THE COURT: Are we all set?

Okay, bring them in.

(Jury present.)

THE COURT: Ladies and gentlemen, the fact that you find the earphones on your seats again is circumstantial evidence of your request to hear certain tapes has been granted. We will get to that in a moment, but let me deal with certain other questions which you put in your note which is Exhibit 5.

The first question is:

"Is there any reference other than Exhibit 12-13 to a phone call from Simms to Robert Simpson on October 11th or October 12th?"

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The answer to that question is no.

The next question that you put is this:

"Would a tape of a conversation between two witnesses who are not defendants be admissible? Any tape in which defendants did not speak?"

The answer to that is that any tapes which are before you in evidence are admissible and indeed have been admitted for such use by you as you wish to give them in accordance with the prior instructions that I have given you on the use of tapes and transcripts.

You also say "Would like read the government's stipulation whether there were any other Simms telephone conversations."

I have discussed this with counsel and we are in agreement that there is no stipulation by the government on that particular point.

Paragraph 2 reads:

"Any reference in Yolanda Simpson's testimony, direct or cross, to a use by Glen of the 626 Riverside apartment other than the eight hour session at the table on or about October 1st."

We have identified the pertinent section of the transcript on that point and I will ask the reporter to begin reading at Page 96, line 10.

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(Read to Page 100, line 22.)

THE COURT: That is, ladies and gentlemen, we are satisfied, the pertinent testimony.

We will now respond to your last request by listening to Exhibits 12 and 13. If any of you have difficulty with your earphones, just put your hands up.

(Tapes played.)

THE COURT: I think we complied with your requests, ladies and gentlemen, and I will ask you to go back to the jury room and resume your deliberations.

(At 4:10 p.m. the jury retired to further deliberate.)

THE COURT: I have given some consideration to further scheduling and what I presently propose to do, but I will welcome your comments, is at about 5 o'clock I could send a note into the jurors telling that they may deliberate as long as they choose tonight, that if they stay as late as 7, we will give them dinner. If they stay as late as nine, we will send them home with limousines again, but that it is essentially up to them and if they wish to adjourn at the end of the working day today and come back first thing Monday morning, that is all right.

I will take comments of counsel, if any.

MR. LEVINE: Your Honor, the government would urge that they deliberate tomorrow. This case is finishing up its second week. The deliberations were interrupted yesterday because of the blackout. They deliberated only a couple of hours on Wednesday evening and it is the government's belief that there ought to be more continuity to the deliberations here and it is not unusual in this courthouse for juries to deliberate on Saturday and I think under these circumstances where the jury has not really, assuming they don't reach a verdict today, hasn't really deliberated two days in a row, that it would break the continuity of deliberations to send them away until Monday, which puts a two-day break in between.

MR. WASHOR: I disagree with that. I think the Court's suggestion is most intelligent. The idea is not to get the case over with. The idea is to get a verdict not pressured by time and not pressured by any type of scheduling. Give them the opportunity to relax. We are not fearful that anything is going to occur over the weekend that is going to prejudice them. They can relax. They have been working quite hard, as I think is evidenced from the questions that they have put out before this court.

I find no impropriety from the standpoint of allowing jurors to kind of relax. Let their thoughts be exchanged. Telling people that have worked hard all week, just went through a trauma and that they have to work on a Saturday, they may find that somewhat repugnant and it may be adding pressure. They know that they have the same leisure that all of us have of thinking these things out and they will arrive at a proper solution whatever it may be.

We have people whose entire household may be turned upside down. You have women up on the jury. They have refrigerators and freezers with stuff that was ruined, personal problems for these people. Let them relax themselves. What is the rush for the verdict?

This should not be a rush to a judgment.

MR.ROSENBERG: Your Honor, may I suggest that we see which way it goes. If it comes to that point, your Honor discuss it with the jurors and see how they feel about it.

THE COURT: All right, perhaps we will cross the bridge when we come to it.

MR.ROSENBERG: Thank you, your Honor.

- - -

udge Haight
7/15/77
Between Odette
And DeSimone

(5:10 p.m.)

(In open court - jury not present.)

THE COURT: I have a note from the foreman of the jury. I will read it to counsel in its entirety:

"I do not know if I can talk to you about our deliberations personally, but it appears that we have a hung jury on all counts for all defendants (11 to 1 vote). The one dissenting party states that there is no possible way of changing his/her mind on the verdict. Please advise."

It is signed by the foreman.

The advice that I propose to give is to give the jury a modified Allen charge which I now propose to give.

Bring the jury in.

(Jury present.)

THE COURT: Ladies and gentlemen, I have a note from the foreman indicating that you have not as yet been able to reach a unanimous verdict on any count with respect to any defendant.

You asked me for my advice. I will give you my advice in the form of a further instruction which I ask you all to pay careful attention to as you did to my prior instructions in this case.

While undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room.

The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. And it certainly cannot be the law that each jurur should not listen in deferenece to arguments and with a distrust of his own view, his own judgment, if he finds a large majority of the jury taking a different view of the case from which he does himself.

A juror should not go into the jury room with a blind determination that the verdict shall represent his opinion of the case at that point, or that he should close his ears to the arguments of men and women who are equally honest and equally intelligent as himself.

Remember at all times that no juror is expected to yield a conscientious conviction that he or she may have as to the weight of the evidence; but remember also that after full deliberation and consideration of all the evidence, it is your duty to agree upon a verdict if you can do so without violating your individual judgment and conscience.

The considerable costs in money and time to both sides if a retrial is necessary suggests that if it is possible for your jurors to reach a unanimous verdict without any injury or yielding a conscientious conviction, then you should mblt 3

do so. Our law permits a retrial unless the jury is unanimous, and there is no reason to suppose that any other jury is going to be of better quality and decide it differently than you.

I am therefore asking you to return to your jury room and continue your deliberations.

(At 5:20 p.m. the jury left the courtroom to resume their deliberations.)

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(9:20 p.m.)

(In open court - jury absent.)

THE COURT: It is 9:20 now and the question arises what is the proper thing to do? There are two questions:

Whether deliberations should cease for the evening, and if they are to resume, whether they will resume on Saturday or Monday.

I know the government is of the view that the jurors should be required to come in tomorrow. I feel some concern about that because they are going to get home very late tonight. They are rather scattered geographically. And Wednesday night when the jurors left at about this time, one of the jurors, Ms. Thompson, did not reach home until 2:30 in the morning. And I think to require jurors who have worked as hard as these have today to get home that light in the night and then have to turn around and come back Saturday morning is a considerable hardship.

At the same time, it is true that because of the blackout and on the distractions the continuity of deliberations has been somewhat interrupted. I think there is a good deal to be said for leaving both of these decisions to the jurors themselves. They know better than we what the present state of the deliberations are and they are perhaps better able to judge how disruptive and counter-productive a Saturday rdlt2

session might be in relation to a Monday session, or vice-versa for that matter.

So, my inclination is to send them a note which would read:

"Jurors: You may deliberate as late as you think best, but I wanted you to know that limousines are available to take you home. If you prefer to go home now, the question arises whether deliberations will resume on Saturday or Monday. Again I am content to leave this to you. I will appreciate a note with your wishes."

MR. WASHOR: For the record, there is no objection by the defendant Smith to the Court's inquiry as proprosed.

MR. ROSENBERG: I certainly have no objection. While I am not feeling well, as I indicated to the Court, I will leave it up to the jurors whether or not they want to come in tomorrow.

MR. GRISORIO: Same with my client, your Honor.

MR. LEVINE: The government objects, your Honor. I think that there is an added factor here that perhaps everyone has overlooked, and that is that today is the last day of their jury service and I think they have been on for two weeks. If the only problem with respect to tomorrow's deliberations would be the late hour that they will get in today, perhaps the Court could set it down for 2 o'clock

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tomorrow afternoon and have them sit for tomorrow afternoon and into tomorrow evening. I think the jurors may be hesitant to sit on Monday, if they think that's what the Court is going to have them do, because many of them have jobs and jury service is only two weeks.

Secondly, I think that it is a better practice in this situation for the Court to let the jury know what the Court has in mind for their deliberations in terms of scheduling. Certainly what goes on in the jury room is their province, but I think the Court has discretion in these circumstances to basically instruct the jury at what times and during what periods of times they will be deliberating.

Third, I think it is clear, your Honor, that the jury deliberated Wednesday evening for approximately an hour and a half, and taking away the time spent in the courtroom today for responding to what I think was four separate notes, while the jury got -- some of them got here at 9:30, I think it is clear they all were not assembled until a quarter to 11.

It is not 9:20. Even it were a quarter of 10, that's 11 hours, taking 2 hours out for meals, that's 9 hours. Taking 1 hour out to listen to tapes, that's 8 hours. Not counting all the time which was spent in court with respect to the other testimony, this jury has deliberated not more than 8 hours in this case. I think to break up the jury deliberations and have 2 hours on a Wednesday evening and some 6 hours on some Friday, and then a couple of hours on Monday is just a very unwise practice, and I don't think that the jury should be given that opportunity to elect that practice.

I think it is in the Court's better judgment to direct them otherwise. If the sole reason for not having them come in tomorrow is the lateness of the hour, I think that is cured by having all of us start later in the afternoon.

MR. WASHOR: First of all, I suggest, your Honor, most candidly, that your suggestion of allowing the jury to make such a decision as to the time and whereabouts of the deliberations does not in any manner or form emasculate the Court's prowess or position. I think because the jury has such a serious problem, as evidenced by their repeated questions, repeated requests to have testimony read back, the fact thatthere is a very sharp and distinct abridgment of unanimity in that jury, that this Court should take the steps to give them the opportunity to make such a decision so that they can be comfortable, so that we can have a free deliberation, so that there can be no effect in any manner or form that would tend to act as a coercion.

You have already given them what has been described as a modified Allen charge. That in and of itself under normal conditions from my past experience should have precipitated a verdict.

However, apparently at this late hour the Allen charge did not have the effect that it normally does have.

Judge, I don't think that a verdict ought to be beaten out of one juror. When I say "beaten out," I don't mean physically. Apparently, if it is 11 to 1, there is one juror, whichever way that juror is voting, who is dogmatic in his or her approach.

If given the opportunity to relax, to go back to their normal ways of life, to reflect on their thought processes, you may accomplish more by giving them that type of freedom than by putting them in a position where they have to reach a verdict.

MR. LEVINE: The government doesn't think that having a jury deliberate two days in a row or what essentially will amount to a day and a half, if you bring them back Staurday in the afternoon, is coercive in any manner or form.

MR. ROSENBERG: Your Honor, they worked late Wednesday night. It certainly was a trying situation. Your Honor had it and I had it and everybody else, and certainly the jurors. Most of them, particularly those who lived in the confines of the city of New York, without lights, without water and air conditioning. They have been working close to 12 hours, and Mr. Levine can analyze any way he wants, but all of them have been confined to that room, outside of going out to eat, for 12 hours.

They have heated discussions, argument and tempers were probably high. In all good conscience, they should not be asked to come in tomorrow.

I personally spoke to your Honor privately in the office and told you I wasn't felling well, but that I would manage to stay with it and do all within my power, if God permitted, and that I would sum up and go ahead with it. I certainly feel the strain. This courtroom is most uncomfortable andwe have been in here all day now.

Your Honor did indicate that you would at 9 o'clock adjourn for the night, and I think that it would be a terrible imposition, not only on the jurors, but I think we have something to consider, your Honor, as well as myself. I am exhausted, tired. The weather having taken its toll on me and many of the jurors. Particularly the blackout situation.

I think in all fairness and good conscience, to come in tomorrow at 2 o'clock, I think is absolutely absurd. I think it should go over to Monday. I understand there is another jury in this building which has already left, so I am told, and that went over until Monday. I see no reason why we can't do the same thing here.

I will go along with the Court's suggestion and not press it, although I certainly haven't the authority, merely I could request it. But I would go along with what the Court suggested and abide by it, leaving it up to the jurors what they wanted to do.

THE COURT: Well, I think it would be quite wrong to insist in these circumstances they come back first thing tomorrow morning. I am essentially going to leave it up to them. I will simply add to the note which I read to you earlier a further sentence:

"We can make it for 2 p.m. Saturday afternoon, if you prefer."

That will expand their options somewhat.

MR. ROSENBERG: Or Monday morning.

THE COURT: Yes. That's apparent.

As I mentioned, I am going to send this note in and see what comes back.

(Pause.)

(10 p.m. In open court - jury absent.)

THE COURT: The foreman's note says:

"We still have not reached any verdict on any of the counts. We would like to resume deliberations on Monday, July 18, 1977. We would like to discontinue our deliberations

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of today at this time." Signed by the Foreman.

I am going to accede to that request and recall the jury and dismiss them for the evening.

(Jury present.)

THE COURT: Ladies and gentlemen, I am grateful to you for your continued deliberations. I will say only to you that your chariots await and bid you good night and we will resume deliberations at 9:3[illegible] on Monday morning.

Kindly remember not to discuss the case among others until you have resumed your deliberations. It may be difficult because family and friends may say, "What in goodness name have you been doing?"

Respond to them in general, if you must, but nothing specific. I'm sure you understand my standing instruction in that regard.

I will see you on Monday and bid you good night.

(Jury dismissed.)

MR. LEVINE: Your Honor, will the marshals be accompanying the jury outside?

THE MARSHAL: We will remain with them until the jury leaves.

(Adjourned to Monday, July 18, 1977.)

UNITED STATES OF AMERICA

vs. 77 Cr. 340

MARION KNUCKLES, et al.

New York, New York
July 18, 1977

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(11 a.m.)

(In open court - jury present.)

(Court's Exhibits 8 and 9 were marked.)

THE COURT: Good morning, jurors, ladies and gentlemen. I hope you had a nice weekend.

I'm glad to see you again.

I have two notes from the Foreman. The first note has been marked Court's Exhibit 8, and it reads:

"The jury would like to know the date of Marion Knuckles' arrest."

There should be no difficulty with that.

MR. ROSENBERG: May 6, 1977.

MR. LEVINE: That's correct.

THE COURT: The date of Mr. Knuckles' arrest is May 6th of 1977.

The second note, Court's Exhibit 9, reads:

"Could you read the law to the jury with respect to Count 2."

I certainly can, and that is what I will do now.

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I will now repeat that portion of the charge which relates to Count 2, the so-called substantive count, and this came in my charge immediately after I had finished the instructions on Count 1, relating to conspiracy. But here we go with Count 2, the substantive count:

"Turning to the substantive count, which appears in Count 2 of the indictment, the grand jury charges that:

"'On or about the first day of October, 1976, in the Southern District of New York, Marion Knuckles, also known as Glenn, Jane Doe, also known as Gwen, Raymond Brown, Rose Smith and Yolanda Valdez Simpson, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute, a Schedule I controlled substance, to wit, approximately 2,000 quarter bags of heroin hydrochloride.'

Now, it seems appropriate, ladies and gentlemen, having read that section of the original indictment to you, to simply say again that although individuals in addition to the three who are on trial before you are referred to in the indictment as prepared, you are, of course, concerned only with the guilt or innocence of the three individuals who were on trial before you.

"I have already read to you the law upon which this substantive violation is based, but let me read it to you again:

"The law provides in pertinent part:

"'It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance.'

"In order to find the defendants or any of them guilty of this count, the government must establish beyond a reasonable doubt, as previously defined to you, one, that on or about the date charged therein, they distributed or possessed with intent to distribute a narcotic controlled substance; two, that they did so knowingly or intentionally. This second element means thatthe defendant knew what he or she was doing, that the distribution or possession with intent to distribute was deliberate and purposeful, and that the acts or conduct were calculated and not due to inadvertence, neglect or mistake; and three, that the substance involved was in fact a narcotic controlled substance.

"I charge you as a matter of law that both heroin and cocaine are narcotic controlled substances.

"Now, a few words about what is meant by distributing or possessing with intent to distribute;

"You will note that the first element of the offense consists of either distribution or possession with intent to distribute a narcotic drug. The word distribution is used in its ordinary sense. It simply means to transfer, to pass on, or to hand over to another.

"The word possess, means to have something within your control. This does not necessarily mean that you must hold it physically. As long as the object is under your control, you possess it.

"A further instruction on the word possess:

"Possession may be of two types, actual or constructive.

"Actual possession means that a defendant knowingly has manual or physical control of the narcotics.

"Constructive possession exists where the narcotics are in the physical possession of or handled by another person, but the defendant, the person alleged to have constructive possession, has the power to exercise control over the narcotics or their distribution, their movement, or to set the price for their sale or to cause their delivery.

"So, too, one who has a working relationship with another, who has physical custody of narcotics so as to cause o effect their delibery to a prospective purchaser, in consummation of the sale, may be said to have constructive possession of the narcotics.

"Further, in this connection, the word intent refers to a person's state of mind. So that the term possess with intent to distribute, means to control an item with the state of mind or purpose to transfer or pass that item or deliver it to another person. That purpose may involve a contemplated sale, but a sale is not required. However, in this case, the government contends that the possession with intent to distribute was to effect a sale.

"The second element of the substantive offense requires that the government prove beyond a reasonable doubt that the defendants distributed or possessed with intent to distribute a narcotic controlled substance unlawfully, wilfully and knowingly .

"Now, what do these words mean?

"Knowingly and wilfully mean deliberately. They mean intentionally. In other words, knowingly and wilfully mean that a defendant distributed a narcotic substance or possessed it with knowledge that he was doing so, that he intened to distribute such a substance or possessed it deliberately and in the free exercise of his will.

"The words knowingly and wilfully are opposed to and consequently do not mean concepts of inadvertence or mistake. In order to prove this element, you may take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

"Direct proof is unnecessary. Knowlege and intent may be inferred from all the surrounding circumstances.

"As to the third element, the indictment charged that the narcotic drug controlled substance was heroin. I have instructed you as a matter of law that heroin is a narcotic controlled substance. I have also instructed you that cocaine is a narcotic drug controlled substance. But you must find beyond a reasonable doubt that the substance in issue was in fact a narcotic controlled substance.

"In that regard, I reiterate the charge I gave to you within the conspiracy count. What the law prohibits is the distribution or possession with intent to distribsute of a controlled narcotic substance. Heroin and cocaine both fall within the statute.

"Accordingly, if you find that all the other elements of the substantive count have been proved by the government beyond a reasonable doubt with respect to any particular defendant, then it is of no significance in law that the substance in question may have been cocaine rather than heroin."

A conviction would result in either case, whether it was actually cocaine or heroin. But, as I have said, before there can be a conviction with respect to any defendant, each of the three basic elements that I have just referred to must be established with respect to that particular defendant beyond a reasonable doubt.

That is my charge on the substantive aspect of the indictment, and I have or I hope I have dealt fully with your two requests of this morning.

So, I will ask you to retire to your room and continue your deliberations.

(The jury resumed deliverations at 11:15 a.m.)

THE COURT: I will be grateful if you gentlemen for the defense would give a full report of what happened to Mr. Grisorio. The record should reflect that at about twenty minutes to 11 he asked my permission to attend an urgent appointment of long standing at 11, which would take him about an hour. He assured me that he had taken that up with his client, Mr. Brown, and that other counsel would, to the extent possible and appropriate, protect his interests.

It seems to me that what happened in response to these two notes from the jury were handled appropriately even in the absence of Mr. Grisorio.

So, if you will just give him the report --

MR. ROSENBERG: May I for the record say I personally spoke with Mr. Brown before the proceedings started and he consented we proceed without Mr. Grisorio present.

MR. LEVINE: Can we get Mr. Brown's consent on the record, your Honor?

THE COURT: Is that correct, Mr. Brown?

DEFENDANT BROWN: Yes.

THE COURT: Thank you very much.

(12 noon. A note was received from the jury.)

xx (Court's Exhibit 10 marked.)

MR. ROSENBERG: Your Honor, Mr. Washor is making a telephone call. We tried to locate him on the floor, but apparently he is downstairs somewhere. He doesn't know about the note.

THE COURT: As soon as he comes back we can fill him in, but we can have some preliminary talk about it.

The jury's note, Court's Exhibit 10, reads as follows:

"Any part of Yolanda's testimony relating to what happened with the white powder after it was bagged on or about October 1, 1976. This would include its departure from the 626 Riverside apartment and subsequent movements and distribution."

Now, the inquiry relates to Ms. Simpson's testimony on those points.

MR. ROSENBERG: I believe it is 117 and 118, your Honor. Now we are trying to check the cross examination and see if there is anything in there.

MR. LEVINE: Your Honor, I think it begins at page 116. At least they are finishing it at 116 and it continues on to page 119, your Honor.

MR. ROSENBERG: I don't agree with Mr. Levine. The note asked about the departure.

MR. LEVINE: And any subsequent movement of it on the street.

And 119, Yolanda is giving some of the glassine envelopes to an individual by the name of Sidney.

MR. ROSENBERG: I don't object to that. I am objecting to 116, which has no purpose. The question on 117, your Honor:

"When you were completed, what happened?"

I believe that's where it should start.

THE COURT: I don't think there is any harm, Mr. Rosenberg, in going back a bit on 116 to demonstrate --

MR. ROSENBERG: They are filling the bags. That is not what they asked for. They asked when it left the apartment, and it is very clear, "When you were completed, what happened?"

I think it is clear.

MR. LEVINE: I think bagging in groups of 10 is very significant for purposes of distribution.

MR. ROSENBERG: That has nothing to do with it.

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Why should Mr. Levine always reach back for something that may be prejudicial? They asked for when it left. It is very clear when she said that Glenn took a bag, her husband came home and she took the rest --

THE COURT: What they are asking is what happened to the white powder after it was bagged. If we start at 116, line 16, the question is:

"After you bagged them in groups of 10, what happened to them?"

Then they are thrown into two separate grocery bags, and so forth. That seems to me to be the place to start.

116, line 16.

(Mr. Washor entered the courtroom.)

THE COURT: To where do you say, Mr. Levine?

MR.LEVINE: 119, line 23, your Honor.

THE COURT: That seems appropriate.

MR. ROSENBERG: Judge, why shouldn't it end on line 18:

"Q Did you do that?

"A Yes."

After that, that's not what they want.

MR. LEVINE: Your Honor, I think there is also a portion of her direct testimony relating to the movement of the packages on page 121, lines 23 through 122, line 4 -- well, line 7.

MR. ROSENBERG: I most strenuously disagree, your Honor. It is clear that he is alleged to have taken some, she is alleged to have taken some to the Roma Garden and given some to Sidney. This is a question about money and everything else.

MR.LEVINE: It is a question about moving the package.

MR. ROSENBERG: It is money given to her. It has nothing to do with it.

THE COURT: The actual inquiry is:

"This would include its departure from the 626 Riverside apartment and subsequent movements and distribution."

MR. LEVINE: On line 2, your Honor --

THE COURT: What page?

MR. LEVINE: 122, the witness, Yolanda Simpson, is relating her conversation with the defendant Knuckles, and she says:

"He" -- meaning Glenn -- "said he was having problems moving the package."

And it continues, the government submits that that directly relates to the question that the jury has asked.

MR. ROSENBERG: I don't think so, your Honor.

That's basically the conversation about money.

THE COURT: But it is inspired, Mr. Levine suggests, by the situation relating to movement or distribution, assuming that the jury draws the inference, as I suppose it is entitled to do,that the reference to "moving the package" relates to the white powder that was packaged.

Mr. Washor, just a brief review:

We are dealing with Court's Exhibit 10, which is an inquiry from the jury, which reads:

"Any part of Yolanda's testimony relating to what happened to the white powder after it was bagged on or about October 1, 1976. This would include its departure from the 626 Riverside apartment and subsequent movements and distribution."

Now, we have determined, or perhaps it is more accurate to say I have determined that we will begin on page 116, line 16. Then I think as far as the first person is concerned, we will go through 119, line 20.

Now, as far as what we have been speaking of most recently -- where do you suggest we begin on that particular section of direct?

MR. LEVINE: Line 12, page 121, your Honor.

THE COURT: And terminating where?

MR. LEVINE: Page 122, line 4.

THE COURT: I think it is a fair inclusion. I think it is true other subjects are touched on, but I think this is quite clearly evidence which the jury could reasonably find relates to movement or distribution.

Is there anything in cross examination?

MR. ROSENBERG: I don't believe so, your Honor.

THE COURT: Then we can recall the jury ,please, for the purpose of reading.

(Jury present.)

THE COURT: Ladies and gentlemen, I have your note, which is marked Court's Exhibit 10, which reads as follows:

"Any part of Yolanda's testimony relating to what happened to the white powder after it was bagged on or about October 1, 1976. This would include its departure from the 626 Riverside apartment and subsequent movements and distribution."

I have discussed this with counsel and we will now read the relevant portions to you.

Mr. DeSimone, please, plage 116, line 16.

(Testimony indicated was read by the reporter.)

THE COURT: That is the relevant section of the transcript, ladies and gentlemen, and I will ask you to return to your jury room.

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(The jury continued deliberations at 12:20 p.m.)

MR. ROSENBERG: Your Honor, I wonder if I could leave in five minutes until 2 o'clock? It would appear they have ordered their lunch and they are going to have lunch.

THE COURT: Yes. I was going to suggest that we be at liberty from 12:30 until 1:30. Perhaps, if you could get back as close to 1:30 as possible, that would be fine. I will send a note to the jury that counsel and the Court will be unavailable from 12:30 to 1:30.

Verdict

(In open court. Jury not present. 2:45 p.m.)

THE COURT: I have received a note from the jury, marked Court's Exhibit 11, which recites the jury has reached a verdict with regard to both counts for all the defendants.

I propose to recall the jury and receive the verdict.

(Jury present.)

(Jury roll is called, all present.)

xxx (Court's Exhibit 11 is marked.)

BY THE CLERK:

Q Mr. Foreman, have the jurors agreed upon a verdict?

A Yes, we have.

Q How do you find as to defendant Marion Knuckles on Count 1?

A We find him guilty.

Q On Count 2?

A We find him guilty.

Q How do you find as to defendant Raymond Brown on Count 1?

A We find him guilty.

Q On Count 2?

A We find him guilty.

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Q How do you find as to defendant Rose Smith on Count 1?

A We find her guilty.

Q On Count 2?

A We find her not guilty.

THE CLERK: Ladies and gentlemen of the jury, please listen to your verdict as it stands recorded:

You say you find as to defendant Marion Knuckles on Count 1 a verdict of guilty, on Count 2, a verdict of guilty.

As to defendant Raymond Brown on Count 1, a verdict of guilty. On Count 2, a verdict of guilty.

As to defendant Rose Smith, on Count 1 a verdict of guilty, on Count 2 a verdict of not guilty.

And so say you all.

MR. ROSENBERG: May I request the jury be polled?

THE COURT: Yes, the jury may be polled.

THE CLERK: Ladies and gentlemen, listen to your verdict as it now stands recorded.

You say you find as to defendant Marion Knuckles on Count 1 a verdict of guilty, on Count 2 a verdict of guilty. As to defendant Raymond Brown on Count 1 a verdict of guilty, on Count 2 a verdict of guilty.

As to defendant Rose Smith on Count 1 a verdict of guilty, on Count 2 a verdict of not guilty.

(Upon each juror being asked the question: "Is that your verdict?" each responded in the affirmative.)

THE CLERK: The jury is polled.

THE COURT: The jury has been polled and has responded in accordance with the verdict said by the foreman.

It's my function to discharge you from further service in this court. It has not been an easy task whatsoever. A number of things have made it difficult. Circumstances have made it difficult, the time involved has made it difficult. The nature of the case has its serious consequences to both the Government and the defendants and that has made it a difficult and important task.

You have worked long hours and deliberated carefully with each other.

I hope you leave this courtroom with an awareness of having rendered a vital public service, the sort of service which we must have people willing to perform if the system is to succeed at all, if criminal justice is to be administered properly.

For those of you who have had your first exposure to jury duty in this case, I hope that it has been an interesting, I know a challenging and difficult experience for you.

I hope it gives you insights into our court system and the system of criminal justice. I hope that is an interest which will abide and which in future years, either in other jury service or in talking with your friends or your own internal awareness of what it is we try to do, will be of a continuing source of interest and benefit to you.

In any event, I do think you for the service you have rendered. I thank you most profoundly for your patience and for your concentration, for your willingness to work hard on this case. I release you now from your vow of silence in this case, but I say to you at the same time that if you don't want to talk about this case to anyone, you don't have to.

I say goodbye to you, I hope we will meet again in some other courtroom or some other place, and I discharge you again with my deep appreciation.

THE CLERK: I have the jurors discharging cards, Judge. May I give them out?

THE COURT: Yes.

(Pause.)

(Jury dismissed.)

MR. LEVINE: The Government moves the bail of the defendants Knuckles and Brown be revoked and they be remanded.

MR. GRISORIO: There has been no reason stated for such action. The defendant Brown has been here always on trial, has never missed and hasn't even been late. No reason now to remand the defendants or to revoke the bail. I move that the bail be continued.

THE COURT: Do you wish to amplify on the Government's request?

MR. LEVINE: Yes, your Honor. The Government submits to the Court that in view of the nature of the proof that has been brought out here, the extent of the heroin distribution operation going on in the City of New York with which the defendant Knuckles and Brown have been a part for several years, that they are a danger to the community.

In view of the fact they are a danger to the community the Government's submission is that they be remanded to await sentence is well founded.

MR. ROSENBERG: Your Honor, it is very clear of the defendant's background. He had some difficulty in Florida when he was working for the telephone company and was out on strike. Otherwise he has no other record before this Court and no other Court. He is legally married and his wife is here. He does have an interest and he does have this steady job where he works in South Carolina. He is certainly not a threat to the community. No proof anything happened since this alleged last occurrence. I'm not going to go into the

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evidence. He is convicted and he stands so convicted before this Court. He is not leaving. He is out on a substantial bail. It's pretty much the live savings of his mother-in-law and father-in-law. His mother-in-law has been in Court each and every day with his wife, who has been here every day with his wife, who has been here every day.

Certainly there are very strong family ties. He has sat here, been here, acted like a gentleman. He has been here all the time waiting for me every morning.

The question of bail, your Honor, is basically whether or not he will be here for sentencing. I respectfully submit to your Honor there is no doubt in my mind that the defendant is available and that he will be here. I don't think Mr. Levine can tell you that he is involved in anything or that he has been involved in anything since this alleged occurrence.

Certainly most of his time has been working in Southern Carolina. I am cognizant of the fact that if your Honor does continue the bail, that he is not permitted to leave unless he gets permission. I say in all due respect as to this defendant, I don't think there is a basis for his being remanded. I think he will be here, he will be available and he certainly is not a threat to the community.

MR. GRISORI: On behalf of Mr. Brown --

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MR. LEVINE: I think it is also clear that defendants, both of them stand convicted of two counts of violation of the Federal Narcotics Laws. Each count carries a maximum sentence of 15 years. While they have each appeared here in this courtroom each day of this trial, at no time up until this moment have they stood convicted of violating the Federal Narcotics Laws and stood as convicted felons subject to penalties of that nature.

THE COURT: What is the Government's position with respect of Mrs. Smith?

MR. LEVINE: The Government's view with her is that she could be continued on her present bail pending sentence.

MR. GRISORI: The fact Mr. Levine says Mr. Brown will be a danger to the community doesn't make it so. He has given the Court absolutely no indication that such might be the case. Mr. Brown has been in New York all his life, so has his wife. His wife is present here and he has two children. He is on $25,000 bail. He was working at the time of his arrest. He is 35 years old. He has always been here on time and I think your Honor may have his record. He has had absolutely no convictions whatsoever, except for this matter. So I see no reason, your Honor, for this. A man with a clean record, no convictions before him, comes here as a first offender, I don't see any reason to be remanded, after having been here time after time on $25,000.

I respectfully request that he be continued on that bail.

MR. ROSENBERG: Some opportunity should be given to these defendants to put their house in order, to make arrangements for their families and all. I honestly, your Honor, and I would not argue so profusely if I felt differently. But I see no basis for a remand now. Whatever the sentence may be, and there is no indication of what the Court will give. I have explained to him the possibilities of it. I see no reason for a remand at this time. I think he and his family should have the opportunity, he should have an opportunity to put his house in order, to be with his family until the date of sentence.

MR. GRISORIO: When their bail was first arranged, it was $25,000 secured by $5,000. After hearing all the details, the magistrate did lower it to 2500, which is why Mr. Brown made bail. I don't think the magistrate would have reduced that bail if he didn't think that Mr. Brown would be coming here time after time. That's exactly what happened.

MR. LEVINE: Your Honor, these defendants now stand convicted of violating the Federal Narcotics Laws. They are no longer awaiting trial, as Mr. Grisori would like the Court to believe. The point in time when they were released on that bail, the defendant Brown was awaiting trial.

THE COURT: The defendants may have seven days to file any motions under Rule 29. The defendant Rose Smith is continued in her present bail situation. In respect of Mr. Knuckles and Mr. Brown, bail is revoked and the defendants are remanded.

Sentencing will take place on Wednesday, August 31st, at 10 a.m. Sentencing on August 31st, 10 a.m.

(Trial adjourned.)

* * * * * * * *

A 335a Botton Con'tinued

1/10	Pd	18
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Continue 9 → FROM

29,970
− 15,000 R.C
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18,525
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B.D. 3525
1/12 ~~1750~~
13195

1/12	630
1/12	350
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1/12 ~~18,995~~
19345

1/9	31,775	
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BROKE DOWN 1/9	8,120	
1/9	500	Pd. R
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1/12	100	
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1/12	300	
	4520	BD

GOVERNMENT EXHIBIT 12a

Background noises

OPERATOR: I'm sorry but she not picking up

SIMMS: Hello

OPERATOR: Yes, she not picking up, she may have gore already

SIMMS: Ah, it's very important tell her it's Warren calling

OPERATOR: I know but she not answering the page. I saw her

here this afternoon

SIMMS: Oh she not answering the page

OPERATOR: Are you expected to meet her here or something?

SIMMS: No, that's just it, ah I'm not but something ah is very important ah turn up ah which means that I have have to try to reach her

OPERATOR: OK I'll try again

SIMMS: Yes, I'll call back, ah, is tell me if she should come in ah, then you tell her that Warren called, hello, hello

hung up

I am Det. George Eaton, Shield 1248;
today is October 12, 1976, Tues;
the time is approximately 1440 hours;
this tape is being headed after the fact;
C.I. Kaliffe has called;
telephone number 737-6666 the New York Health Club at 1433 York Avenue in an attempt to speak to Yolanda Valdez. At this time Valdez is not present and the call will be made again later and the consent will be applied at that time.

I am Det. George Eaton, Shield 1248;
today is Tuesday, October 12, 1976, and the time is approximately 1447 hours;
I am utilizing a Bell & Howell Cassette recorder #2 which is the property of the Special Narcotics Prosecutor Office and contains an original tape C-6837 which has a prior call to telephone number 737-6666 C.I. code name Kaliffe will call telephone number 737-6666 and attempt to speak to Yolanda Valdez C.I. Kaliffe do you agree to have this telephone conversation recorded?

SIMMS: I'm code name Kaliffe; I'm a party to a telephone conversation about to take place between myself and Yolanda Valdez; I consent to the recording of this telephone conversation.

Dialing

Ringing

AL:lnd
06-2832

OPERATOR: Good afternoon, New York Health Club, May I help you?

SIMMS: Yes, please this is Warren again, ah, I'm trying to reach

OPERATOR: Yes, hold on Warren

SIMMS: Thank you

YOGI: Hello

SIMMS: Hi

YOGI: Hi Warren, I'm sorry I was busy when you called

SIMMS: That's alright darlin', Ah, I been trying to track you down; I been having trouble

YOGI: Yea, listen I left my husband; we had another fight; I had a fight with Glenn in the street.

SIMMS: I know all about that; that's why I'm calling you; I want to know what the hell is going on, Yogi

YOGI: Yea, man I did something a little something for him and then you know he give me a few hundred dollars and I tell him it's not worth it; I think I should get more and he tell me, he didn't want to talk about it, so then the problem that we was really fighting with; cause Karen that gave me Gwenn number and told me to call her and do a little favor first so I just called and that he had told, so when he saw me in the street, he said listen leave that number alone, I said I don't know what you talking about, so you know he started to point his finger in my face, and we started fighting, but you know the real reason is because like I told him I call him yesterday and told him he owe some more money and ah, he can't just throw me a few dollars because I could have went to jail for the rest of my life and tell me that ah you know he don't want to talk about it no more, and he don't owe me nothing and all that, you know

SIMMS: Well now that's, first of all do you have Gwen's number?

YOGI: Karen gave it to me; I don't have it any more; I'm not calling him any more.

SIMMS: Oh, Karen, give to you

YOGI: Yea

SIMMS: Oh, she got it, cause she didn't have it; I give her the address myself

YOGI: Yea, she asked me for it; I told her I didn't want to be involved you know, I can't do that

SIMMS: Ah, well now, ah what did he actually pay you, Yogi?

YOGI: He gave me about four hundred dollars

SIMMS: Ah hun

YOGI: Ah ah, I mean the thing I did, if I describe it, he's give me Ten Thousand, but you know, that's what he give me.

SIMMS: Ah, give me a idea of the extents

YOGI: The extents

SIMMS: Yea

YOGI: I let him use my apartment twice; I work for 8 hours without sleeping; I carried the thing from one house to my house; I drove the stuff around in the car and matter of facts the police stop me; I have, you know, this, went he had got it out, the police came stop me and asked me what I was doing parked down there, downtown and just God was with me or something because he had just gotten it out and I been keeping the stuff in my house, you know, and I kept some of the stuff in my house and I mean, I did all that and he throw me four hundred dollars.

SIMMS: Well, what that's that's bullshit

YOGI: I know, I work twice for 8 hours, man, each time

SIMMS: Well, well, what's his reason for not giving you your money

YOGI: He's talking about he's having problem getting his money, and I waited, I waited a whole week, before I kept nagging him, I said listen I'm having trouble my husband, I need to get my own apartment I need some money, I was crying in the street and that's what made him throw me them few hundred dollars

SIMMS: What

YOGI: Yea

SIMMS: Well, why didn't he give you no money up front?

YOGI: He didn't give me, Rose, Raymond, he didn't give none of us and he still owes them because he was telling me that he was having problems getting his money, because the thing wasn't right.

SIMMS: Ah, but that ain't your damn fault, because it wasn't right.

YOGI: Of course, and meanwhile he's spending 5, $600 a day playing numbers and I'm sitting there looking at him and he got a nerve to tell me you know I got to wait until I had to raise a little hell and you know that's the next day he told me to meet me here that next day, I figure he was going to straighten me all out

SIMMS: Yea

YOGI: He's throws me 3-4 hundred dollars and tell me he don't want to talk about it no more; I said listen I think you owe me some more if you want to sit down and talk about it, you know everything I did for you, I said now I think you owe me more and ah, you know me and you talk about it, he said, well I don't want, I don't have anything else to say

SIMMS: Ah, well did he pay Rose and Raymond?

YOGI: No, I talk to them; they said they waiting you know he hasn't paid them and ah they just sit tight you know I don't know why, but that's what they are doing.

SIMMS: Well, cause well they're ass kissers

YOGI: Yea, well you know, and he said why did I tell Raymond and Rosie that he was no good, and I said because you're not no good, you know you do that to me, you know.

SIMMS: Yea, because you, yea, yea, you been too good to him, you did too much for him

YOGI: Too much for nothing

SIMMS: And ah you ain't suppose to take that kind of risk without getting, getting, getting some money for it. He's knows this, I mean, I'm I was so God Damn mad when I found out about it and couldn't see straight, I've been calling you for two days

YOGI: Yea, thanks a lot

SIMMS: Because this, this shit is for the birds

YOGI: I know, so I call him last nite at the Bar, and he, you know, I told him, why did he fight with me like that, he's told me he didn't really wants to fight and he wanted to know why, because I pulled a gun out on him, and I was so mad I could of shot him, but I didn't, you know, so you know I told him, what are you going to do about the money you owe me, well he said I don't think I owe you anything, I said I'll come down there later on and straighten it out because you do owe me and if you want me to pinpoint, you know I described him on the phone, about holding the stuff and carry it and what mean by he don't owe me so you know, I just hung up the phone and that was last nite because you know I was a little upset after

SIMMS: Well, no, I think, this has got to be approached another way, Yogi

YOGI: Yea

SIMMS: Now, are they working?

YOGI: Are they?

SIMMS: Are they working now, I mean, is he getting money that's what I want to know

YOGI: Well from what I hear, from what he's tell me ain't nothing else come thru you know, that two things come thru and that was no good and ah I don't think any work is going on now, I don't know

SIMMS: Well, that ain't your fucking fault

YOGI: I know

SIMMS: Ah, he suppose to pay you, I, I got to let me think on it.

YOGI: O.K., so listen, I'm really not staying nowhere, I'm staying with a friend because Robbie and me and him had a fight

SIMMS: Yea I just got thru talking to him and ah, he explain me, ah, the situation from his perspective and now, let me explain you something else, Yogi

YOGI: Yea

SIMMS: Now, when you did this you was at his house; right, you and him was staying together, right.

YOGI: Right.

SIMMS: Now, he had a responsibility in this, you understand what I'm saying

YOGI: Hm, hum

SIMMS: You shouln't have ah, ah, kept everything away from him

YOGI: No, I told him everything

SIMMS: Well

YOGI: Well, I mean what he needed to know

SIMMS: Well, ah, I can understand a certain amount of secrecy but, ah you and him shouldn't have to fight, ah, about this, because this really is not his fault

YOGI: I know, but we, we just fighting because me and him don't get along no more and he having trouble in the streets, so you know, I just don't wants to live there with him man, you know, I was the only reason I was there, is because of the baby.

SIMMS: Yea, I understand that I just got thru talking to him; he's in the house now with the baby.

YOGI: Yea, but he's making, you know, I don't want be with him; like I told him, and as for him, you know I like now I'm involved since you went out there and fought with Glenn, you know making that as an excuse

SIMMS: No, well that's not really an excuse; but he feels some responsibility because I mean after all.

YOGI: But why does he got to fight with me then.

SIMMS: Well, he ain't he shouldn't fight with you either you know I don't hold with that because I told him this to his face

YOGI: Right.

SIMMS: So, ah, you know

YOGI: But he did it again and he keep doing it then we had two fights since I been there, the only reason I stood it because of the baby, I just walk out and I took the little bit of things, I had and I just walk out.

SIMMS: Well, I got to figure on how to deal with this problem, ah, with Glenn, I don't like this at all.

YOGI: Right

SIMMS: And I got to figure out a way to deal with it and I will figure out a way to deal with it.

YOGI: O.K.

SIMMS: Now, let's see, you not staying at home and

YOGI: No, I stood at a hotel last night but I was going to stay at a friend of mine tonight

SIMMS: I'll tell you what to do, call Lynn.

YOGI: I don't have the number

SIMMS: You don't have Lynn number

YOGI: No.

SIMMS: O.K., I'll give to you

YOGI: O.K. hold on

SIMMS: O.K.

SIMMS: The number is ah 690-

YOGI: Ah huh

SIMMS: 3216

YOGI: Ah, Huh

SIMMS: Now, shes working during the day, she should be home around 5

YOGI: O.K.

SIMMS: Now, you get in touch with Lynn, let her know, where you can be reached at night

YOGI: O.K.

SIMMS: O.K. now where I'm, going to reach you tomorrow?

YOGI: Well, I guess I'll be here about 11:00 You can reach me here

SIMMS: You be there at 11:00

YOGI: Right

SIMMS: O.K. I'll call you there tomorrow, say between 11:00 and 1:00

YOGI: O.K. that's good I'll wait here for your call

SIMMS: That's good you wait there for my call and you get in touch with Lynn tonight and don't, don't bother Glenn.

YOGI: No.

SIMMS: Let me think, think on this

YOGI: O.K.

SIMMS: Don't say no more to him

YOGI: Right

SIMMS: Ah, just let me think on this, and ah, I'll get back to you

YOGI: O.K.

SIMMS: O.K.

YOGI: Thanks for call, Warren

SIMMS: O.K., Baby

YOGI: bye, bye

SIMMS: Bye, now

I'm Det. Eaton, the time is now approximately 1458 Hours; I'm closing this tape with results.

AL:lnd
06-2832

GOVERNMENT EXHIBIT 13a

P.O. CLARK: Testing, testing 1234-4321 - Im an Police Officer James H. Clark, Shield Number 27952 assigned to Manhattan North Narcotics area. Today is Thursday, October 14th, 1976. The Cassette tape serial number is C-6902. This tape is an original. It is a Bell and Howe recording device which is the property of the office of the prosecution of the Special Narcotics Court. Telephone call will be made by code name Kaliffe to this number 862-4592. Purpose of this call, -- is to speak with J. D. Yogi. Code name Kaliffe do you take party to the telephone conversation about to take place between yourself and D. J. Yogi? Agree to have that conversation recorded?

SIMMS: I'm code name Kaliffe. I'm a party to a telephone conversation about to take place between myself and Yogi. I consent to the recording of this telephone conversation.

P.O. CLARK: This is P.O. Clark. The following will be a test of the telephone pick up followed by a call to the subject. The time now is approximately 13:10 hours. -

(Sound of dial tone and dialing). Phone ringing -

P.O. CLARK: This is P.O. Clark. There was no answer - ah-ah at the above number, code name Kaliffe is gonna contact ah-ah - J.D. Yogie at the telephone number 737-6666 - (Dial Tone - (Dialing Ring)

FEMALE VOICE: Good Afternoon New York Health Club
May I help you?

SIMMS: Ah, Good Afternoon, this is Warren. Ah may I speak to ah Miss Yolanda Valdez please.

FEMALE VOICE: Yes Warren, she'll be at home at two.

SIMMS: She'll be home at two?

FEMALE VOICE: Right.

SIMMS: Alright, thank you for calling.

FEMALE VOICE: So call her then - and also tell her that her guest passes were mailed back to the club - to pick 'em up, tomorrow morning.

SIMMS: Her desk passes?

FEMALE VOICE: Her guest passes.

SIMMS: Her guest -

FEMALE VOICE: She'll know what it is.

SIMMS: Yea, I know.

FEMALE VOICE: Thank you.

SIMMS: If, if, if it's mailed back to the club.

FEMALE VOICE: Yea.

SIMMS: And she can pick 'em up tomorrow morning.

FEMALE VOICE: Thank you now.

SIMMS: You welcome.

FEMALE VOICE: Bye.

SIMMS: Bye.

P.O. CLARK: This is P.O. Clark. This tape is not going to be closed at this time. An attempt will be made ah - a little later by code name Kaliffe to contack ah J. D. Yogi at home.

P.O. CLARK: This is P. O. Clark. The time now is approximately 14:06 hours. Code name Kaliffe is gonna again try to contact ah J. D. Yogi at 862-4592. Ah, there will be a brief statement by code name Kaliffe.

SIMMS: This is another attempt to reach ah Yogi on this tape. The consent given at the beginning of this tape is still in effect. (Dial tone - Dialing - Ring).

P.O. CLARK: P. O. Clark ah - This tape is not going to be closed at this time. There'll be another attempt to contact J.D. Yogi.

This is P. O. Clark. The time now is approximately 16:40 - strike that - Yea - time now approximately 15:43 hours. There will be another attempt by code name Kaliffe to contact Yogi at 862-4592. If ah - there's no answer there, he will try 737-6666. There will be a brief statement by code name Kaliffe.

SIMMS: This is another attempt to meet Yogi. This is code name Kaliffe. This is another attempt to reach Yogi on this tape. The consent given at the beginning of this tape is still in effect.

(Dial tone - Dialing - Ring).

YOGI: Hello.

SIMMS: Hi, how ya doing?

YOGI: O.K. How are you?

SIMMS: Rest is best (inaudible) dropin all this shit all around me here - laugh - Just a mad house ya know.

YOGI: Ya, when am I going to see ya?

SIMMS: I'm going to try to arrange - ya know probably the first of next week darlin, because you only get four visits a week ya know.

YOGI: Ah, Ha.

SIMMS: Yea, this dam thing is all screwed up, and you know its been under a semi riot, ah conditions. You read about it in the paper? Oh you don't read the paper.

YOGI: Yeah, I did read about it - right.

SIMMS: Yea.

YOGI: But I didn't know it was where you were at - ya know.

SIMMS: Yea, Yea.

YOGI: Oh.

SIMMS: Yea that's where it is. That's what was happening. (inaudible)

YOGI: So did they do what they wanted?

SIMMS: Huh?
What was it exactly what they wanted?

Well, they, they were talking about somethings on Ah! some visits and ah?

YOGI: (Inaudible)

SIMMS: Aside from that, there was something they were talking about from the Court but see, that, that kind of stuff requires a legislation. You know what I mean?

YOGI: Right, but it was the visiting, right?

SIMMS: Ah! well the visiting was one of 'em, yes.

YOGI: Ah ha!

SIMMS: Was one of the issues - and it's not resolved yet - it's still ah! kind of up in the air - some of it - but

YOGI: Because (inaudible) courts, they're the ones that are messing everything up.

SIMMS: Yea, that's, that's where the whole problem is.

YOGI: Right. So how ya feeling?

SIMMS: Alright. I tried to reach you yesterday ya know.

YOGI: Right. I was, ya know, trying to see what I was going to do (inaudible) to come back.

SIMMS: Yea, I figured you were ah moving around in fact, that's because of I'm only thinking in terms of Valdez. I'm I'm glad you're back at the house. You know what I mean?

YOGI: Right - And then, I don't want to be up in the air. I want to get things situated before I make any kind of (inaudible)

SIMMS: There, ya - now ya thinkin'.

YOGI: Now I'm thinkin'. (laugh)

SIMMS: Now, you're thinkin', that's right. That's the way you're suppose to think baby.

YOGI: Right. I talked to Lynn yesterday.

SIMMS: Yea, she told me. Now there was a couple of things that wasn't (inaudible) by the way, you haven't beek back in touch with Glenn yet,

have you?

YOGI: No.

SIMMS: No, well I don't want you to.

YOGI: O. K.

SIMMS: Ah, until uh figure on just how I want to deal with this matter - cause I haven't really made up my mind yet - to tell you the truth. I'm, I'm considering some various things. There's a couple of things that I, that wasn't clear to me. Ah, that ah, I wanted you to clear up. Ah, you told me about two times.

YOGI: Ah ha.

SIMMS: But now, you didn't say ah what he was working on - about, about what was the quantity there about?

YOGI: Like the first, Ah, let me see, I say, it would look like maybe two ounces of smoke.

SIMMS: Oh that, not very much

YOGI: No, so all together I'd say Two Thousand five hundred quarters.

SIMMS: Ah ha

YOGI: By both trips you know one less than the other.

SIMMS: Right, right - that that that's pretty close - Now what's his name said something - Ah, Oh, Robert said that a he saw you ah he saw money being passed - you know you passing money to Glenn.

YOGI: I passed money to Glenn?

SIMMS: Yea, he said he saw -uh- you handled a a according to him, he said you handed over a hundred thousand dollars looked like to him.

YOGI: Oh, that's a lie (laugh)

SIMMS: Well, he said that - did he see any large, you with any large sum of money from Glenn?

YOGI: No money. The only thing he saw was um about - see you know, I know exactly what he was talking about, he's talking about the quarters that I was holding - you know, the silver quarters.

SIMMS: Oh, oh, right.

YOGI: That's what he was talking about and it was worth that much.

SIMMS: The silver quarters.

YOGI: You know the quarters.

SIMMS: Right.

YOGI: (Inaudible)

SIMMS: Yea, right.

YOGI: But a - he added it up. It was about 107 quarters bundles of tens so he figured that was the amount - (inaudible) - (laugh)

SIMMS: Oh, oh, oh, oh, oh, oh Shit - See, I felt cause in order to do - cause I had a different picture in my mind.

YOGI: Ah ha.

SIMMS: Ah right now.

YOGI: Maybe wasn't probably that much you know.

SIMMS: Right, right.

YOGI: You can imagine.

SIMMS: Well I have an idea now and now lets lets go step further.

YOGI: Then he wanted me to take that - I said I can't do that like that - you know.

SIMMS: No No you can't.

YOGI: So he could use it and then me and him had a fight because I wouldn't give it to him - and ah you know Glenn said it was no more around so he had to wait and me and him had a fight because you know he tried to put me in the middle.

SIMM:S No No you couldn't do that.

YOGI: I know but I thought (inaudible)

SIMMS: No No ah now was this brown or white?

YOGI: White.

SIMMS: Huh?

YOGI: White, off white.

SIMMS: Off White yea.

YOGI: Yea.

SIMMS: Ah Ok. now another thing thats not really clear to me is is Gwen's a fuction here now cause I know what goes on between her and Glenn.

YOGI: Ah ho.

SIMMS: See I know that

YOGI: Sexually?

SIMMS: Yea.

YOGI: Oh well this this was business.

SIMMS: What what totally business?

YOGI: Wa ya well I know there sexually to I don't know ah she you know we went to her house and she had this (inaudible) she had it there so she gave to her he gave it to me and I brought it up here.

SIMMS: Right.

YOGI: But ah.

SIMMS: You didn't actually work on it in her house though?

YOGI: No.

SIMMS: No Ok.

YOGI: No.

SIMMS: Right cause I was just wondering if she was down with it you see that's what I was.

YOGI: Well she gave it to him so I don't know how -

SIMMS: Yea but I know - I know - I know little bit more about that than you do.

YOGI: Right.

SIMMS: Because ah I know that she does have the the the connections to get it.

YOGI: Yea thats what I was told.

SIMMS: Yea this is correct, ah see see its her connection and cause he and her use to go together, I'm just telling you this as a point of information.

YOGI: Oh yea.

SIMMS: See him and her went, they they use to go together she claims she got a baby by him.

YOGI: Right, and he was sterlized.

SIMMS: Right.

YOGI: At the the time it took place yea.

SIMMS: All this nonsense.

SIMMS: But, she does have the connections.

YOGI: Right.

SIMMS: And ah if if a he needed somethin we got give (inaudible) somethin.

YOGI: Right.

SIMMS: Ah if he'd ah he would go to her, but I can't understand then, cause I was under the impression that this was brown, not they say this is blue tape, Right?

YOGI: The tape?

SIMMS: Yea.

YOGI: Well we put da the first time we put blue then we put all different colors cause we ran out, color blue.

SIMMS: Right ah ha.

YOGI: But isn't it basically blue.

SIMMS: Right basically blue.

YOGI: Right.

SIMMS: Now this is what I can't understand though, How did he not get his money you see that the part that that that

YOGI: That the part that I don't understand because it was being a moved -

SIMMS: Right

YOGI: From what I

SIMMS: Well I know it was because see I had word off the street.

YOGI: Ah Ha

SIMMS: That tha its was being moved and that how I knew it was blue tape.

YOGI: Right.

SIMMS: Because it was under a blue tape.

YOGI: Right.

SIMMS: And I know of one person who had it was was Wanda.

YOGI: Well she must, yea she was with (inaudible) you know she was working for him.

SIMMS: Right.

YOGI: Right.

SIMMS: And course naturally Raymond and Rose.

YOGI: Right Right.

SIMMS: Right so ah this much I had already gathered, so ah I couldn't understand where where his plans came from that there's no money - because a there a it it if there's no money then it mean it had to went bad.

YOGI: Right but see he might of not made, then he was spending a lot of money and he might not have made what he wanted to, but Ah -

SIMMS: That ain't got the godamn thing to do with paying paying your bills of of making what you want to make.

YOGI: Right.

SIMMS: A ain't got a damn thing to do with if you got the powder.

YOGI: Because on piece of paper and pencil from what I went through I would say, an a I don't know what he made but I'm sure he made what he was suppose to cause he -

SIMMS: Well let's see now, let me figure this out right.

YOGI: I would say five thousand.

SIMMS: Well let well let well let me, let me let me figure this out - yea. About twenty five hundred you say roughly - right?

YOGI: Right.

SIMMS: Alright twenty five hundred I'll give you a figure right away.

YOGI: And that's twice.

SIMMS: Right as or twenty five hundred each time?

YOGI: Yea one maybe less ya know because he was trying to even it off but thats what it was about.

SIMMS: Right.

YOGI: Cause you know it was a little less but the first one was twenty five and then there was a little less.

SIMMS: O.K. Well then let me do the twenty five for you (inaudible) Ah the twenty five hundred quarters come to a hundred and twelve thousand dollars, and then there was a small amount after that.

YOGI: Right about a fifteen hundred or a little more.

SIMMS: About-well lets figure was this on the basis of fifteen, lets see what we got here (inaudible) 67 thousand five hundred. 00 ten 7,8,9 ten six seven one so thats a total of a hundred eighty thousand, now that means now lets see what he had I can tell you just about, he had close to a key, he had a kilo.

YOGI: Um hem.

SIMMS: Yep - he had a kilo.

YOGI: Right.

SIMMS: Right, so if he had a key that a hundred and eighty thousand and he had to pay fifty for it thats zero, zero, zero, so he still should have made a hundred and thirty thousand I can't see no excuse for not giving you that money.

YOGI: Right.

SIMMS: None

YOGI: Not only that you know I carried a whole lot of cut to Gwen's house when the police stopped me cause he had a hanging around there, and so in her house he had boxes full of cut.

SIMMS: He took it to her house.

YOGI: Right.

SIMMS: After you finished?

YOGI: No this was a before we even started anything -

SIMMS: Right Oh he took it to her house -

YOGI: Right and then and when he had me carry the stuff to a ya know to a my house and then he had me running errands in between that time, ya know.

SIMMS: Alright now let me see if I can pinpoint this a just a little bit further - now a this was when let lets go back to when you went to her house you say the police stopped you one time, when was that?

YOGI: This was about three weeks ago or a month you know we were working he kept saying wait wait - so I say about three weeks ago.

SIMMS: A - Huh.

YOGI: When he first came into town -

SIMMS: Oh when he first - Oh well wait a minute - wait a minute now, let me - let me - let me see if I can pinpoint this. You picked him up at the Satin Doll on front of Satin Doll one day and you went somewhere you stayed about forty about half hour or so and then you brought him back, and then you came back again and picked him up again.

YOGI: A ha.

SIMMS: Did you recall this?

YOGI: Well I think that's the time we took the cut down there - and then we - you know had to meet him back there.

SIMMS: Right I figured as much, because somebody told me-

YOGI: Right.

SIMMS: That they saw you pick him up there.

YOGI: Right.

SIMMS: This was a couple of days after he come back here, so you picked up him then.

YOGI: Right thats a couple of days after he came back, that's when things started in motion.

SIMMS: Right, Right you picked him up and took him some - some place.

YOGI: Ah Hem

SIMMS: Ah there's still no excuse though I can't seem -

YOGI: There's no excuse - except for you know what ever he's making.

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SIMMS: Now do you know for a fact that he hasn't payed Raymond and Rose?

YOGI: Oh yes they told me this yesterday, I saw them yesterday and they said well you know we know that what to do we still waiting he hasn't payed us so.

SIMMS: An it

YOGI: This is why they didn't see what I was, why I was so upset because see they laying on his money so they can talk, you know they can ah.

SIMMS: You mean there holding money for him.

YOGI: Yea, you know they

SIMMS: Are they still working?

YOGI: They still working, plus ah you know he's Raymond is one of his contacts where he a you know Raymond distributes a little bit to them people.

SIMMS: Yea

YOGI: So this what I figured you know so.

SIMMS: Oh!

YOGI: Raymond and them are collecting a little money and you know

SIMMS: Oh so therefore they figured they get there's.

YOGI: They'll get their's in the long run.

SIMMS: Right.

YOGI: Cause he can't go no where but ya na mean while he's telling me all these different things.

SIMMS: Ah ha.

YOGI: An I'm out the picture now because I did what I had to do.

SIMMS: Yea - well I understand that in cause after the fact you, you rest to sure you gonna stay out of the picture cause he ain't gone use you no more.

YOGI: Right.

SIMMS: Because he has mis-misused you an

YOGI: Right Right.

SIMMS: An ah so that that-cuts you

YOGI: I don't need that

SIMMS: No

YOGI: No

SIMMS: Ah now lets -

YOGI: Thats another thing

SIMMS: Ah well if Raymond-well I can understand how Raymond and Rose then - they can wait.

YOGI: Yea

SIMMS: Because if they still a a got their's -

YOGI: Any borrowed time you know they wait every day an he may get there or may get all that shit-

SIMMS: A hum but that ain't Shit

YOGI: Right they sittin there like two dummies but I ya know

SIMMS: Yea well thats what they are dummies cause they not going to speak up a neither one is gonna -speak up, a they just gonna sit back a and wait.

YOGI: And see what happens.

SIMMS: It it but I can't see how that would last that long because were talking about a total of about three thousand quarters.

YOGI: Well probably it didn't move fast enough.

SIMMS: Oh it it could of progressed by the somebody else was out too, so a it probably wasn't movin fast enough thats a

YOGI: Cause he said - the first people he gave it stuff to the money didn't come back they - cause the stuff wasn't good so thats why he had to make it up with the second.

SIMMS: Ah

YOGI: To give them people a chance to bring back some of the money so ya know.

SIMMS: Oh

YOGI: That's what he said.

SIMMS: Yea well so so probably the only real cash up front money he got was from Rose and Raymond really and Wanda cause Wanda would have payed.

YOGI: An a another fella, you know Sidney.

SIMMS: A Sidney?

YOGI: Yea

SIMMS: Oh Sidney's back with him now

YOGI: Yea because I had to give something to Sidney

SIMMS: Uh huh ah

YOGI: So I guess them three between them three they kinda do something.

SIMMS: I'm just trying to figure - that's what I'm trying to figure, what I'm trying to figure out is work for a I says Wanda Sidney, Rose and Raymond on cause he was doing something with a - what's this I don't know if you ever met him there's a guy called Spongy

YOGI: No not, by name.

SIMMS: Oh you probably didn't meet him - cause he's been hanging around him so I figured that a -

YOGI: A light skin fella?

SIMMS: That's right

YOGI: Look like a (inaudible) but he told me that he was a Glenn's cousin

SIMMS: Yea - that's that's

YOGI: Yea I seen him yesterday he's hanging around counting money

SIMMS: (Inaudible) Right. Yea he look a little like Glenn. Right - Right he says he says he's Glenn's cousin

YOGI: That's what he told me a couple of days ago ya know - cause he asked me I was waiting to speak to Glenn so he said are you waitin to speak to my cousin, I said no, ya know something like that

SIMMS: Right - Yea that's him. Yea so I figured he was a but doing something - Yea well he's probably still waitin for that money but I gotta figure out a way to squeeze him. You understand I'm saying. I don't like what he did - I don't like nothin that he did.

YOGI: Right

SIMMS: Because number one a when you - when you go to work like you worked - you supposed to be paid out of pocket - up front.

YOGI: Right

SIMMS: You ain't suppose to be waitin, until all this nonsense, if you gonna wait at all, then you shouldn't have to wait no longer than the first person a you know the turns turns in some money and then you suppose to be given some a, given the proper amount of money, now this this four hundred dollars this, this was nothing - this you should been (inaudible)

YOGI: Don't keep me waiting Yea

SIMMS: At least a couple thousand dollars he should a give you at the very, very least.

YOGI: I'm telling you (inaudible) he don't want to talk about it.

SIMMS: Yea well

YOGI: It's finished you know

SIMMS: Yea well it ain't finished it ain't finished by a long shot

YOGI: I know

SIMMS: Now I want you to know it ain't finished. Ah I got the picture, I got the picture and a I'm gonna decide, a and I'm gonna decide very quickly on just a how will have to go about this, because I'm not going to let him get away with it, I'll tell you right now.

YOGI: Right

SIMMS: I'm not gonna let him get away with a doing you that way - A it don't make no kind of sense, you took too much chance for hir and you're a trusted person, he knows you're a trusted person and this which is why he came to you in the first place.

YOGI: Yea

SIMMS: Because he has a shortage of trusted people out there and then to do you like that is just was not called for, and I'm not gonna let him get away with it.

YOGI: O.K. thank you, is there anything I can do for you?

SIMMS: A no well, I'm gonna go over some things with you, cause I'm make arrangements for you to see me personally a definitely the beginning of next week by the first of next week.

YOGI: O.K.

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SIMMS: You see because long can get busy from Monday, Tuesday, Thursday and Friday.

YOGI: A ha.

SIMMS: But a I'm going to make arrangements for you to see me definitely next week

YOGI: O.K.

SIMMS: And a we'll work out just how we're going to deal with it.

YOGI: Right (inaudible)

SIMMS: But a some something's got to be done about it.

YOGI: O.K.

SIMMS: Alright Baby

YOGI: So I'll take it easy for awhile

SIMMS: You just take it easy don't say anything to him.

YOGI: Right

SIMMS: At all, don't don't contact him or nothing

YOGI: Right O.K.

SIMMS: A I'll I'll figure out a way to deal with him, we'll take care of it.

YOGI: O.K. so take care

SIMMS: O.K. Baby

YOGI: Bye Bye

SIMMS: Bye now.

CLARK: This is P.O. Clark. The time now is approximately 16:01 - this tape is going to be closed a positive results after conversation with J.D. Yogi.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT COURT OF NEW YORK

UNITED STATES OF AMERICA,

v.

MARION KNUCKLES

Docket Number 77 Cr. 340

BEST COPY AVAILABLE

CHARLES S. HAIGHT, JR.
(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that MARION KNUCKLES appeals to the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other (specify) of conviction entered in this action on September 12, 1977.
(Date)

JAY GOLDBERG
(Counsel for Appellant)

Address
299 Broadway
New York, N.Y. 10007

Date 9/12/77

To:

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ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

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☐ U.S. Attorney has placed order
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Prepare transcript of
☐ Pre-trial proceedings
☐ Trial
☐ Sentence
☐ Post-trial proceedings

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The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment ☒ Funds ☐ CJA Form 21

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